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[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore)*

PRESENT :—VISCOUNT SIMON, LORD MACMILLAN, LORD WRIGHT, LORD SIMONDS AND SIR JOHN BEAUMONT.

Abdul Rahim .. *Appellant*†

v.

The King-Emperor .. *Respondent.*

Criminal Procedure Code (V of 1898) sections 374, 423 and 537—Evidence Act (I of 1872), section 167—Misreception of evidence in a jury trial—Conviction—Murder reference and appeal—Power of High Court to exclude such evidence and maintain the conviction—Misdirection and non-direction of a jury—Competency of the appellate Court to consider the evidence itself and maintain the conviction—Difference between Indian and English Law as to value to be attached to the verdict of jury in criminal cases.

Where inadmissible evidence has been admitted in a Jury trial, in a murder reference and appeal or in an appeal from a conviction therein, the High Court may after excluding such evidence maintain the conviction provided the admissible evidence remaining is in the opinion of the Court sufficient clearly to establish the guilt of the accused.

Where there has been a serious misdirection or non-direction of a Jury the High Court can itself consider the evidence and maintain the conviction if the evidence clearly establishes the guilt of the accused. In deciding whether there has been in fact a failure of justice in consequence of a misdirection the Court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.

The fact that in some instances an appeal would lie both on fact and on law while in others an appeal would lie on law only is neither an important distinction nor a determining feature for this purpose.

There is a wide disparity between the law of India and the law of England in their respective attitudes to the verdict of a jury in criminal cases. To emphasise the difference it is enough to point out that the statute law in India in certain circumstances permits an appeal against a Jury's verdict of acquittal and authorises the appellate Court to substitute a conviction on its own consideration of the evidence. This is not to say that the verdict of a jury is to be lightly regarded in India. Far from it. The Legislature has enjoined the appellate Courts expressly to pay regard to it. But at the same time it has thought it right and necessary in the circumstances of India to confer upon appellate Courts extensive powers of overruling or modifying a verdict in the interests of the due administration of justice. Under such a system arguments derived from English practice are inapplicable and indeed misleading.

The Judgment of the High Court reported in I.L.R. (1945) Lah. 290 (F.B.), affirmed.

Phineas Quass and *M. P. Solomon* for Appellant.

B. Mackenna for the Crown.

Quass.—It is no part of the appellant's case that if there be any misdirection of evidence, however unimportant or non-direction however trivial, or unimportant misreception of evidence, that a

26th February, 1946.

* I.L.R. (1945) Lah. 290 (F.B.).
† P.C. Appeal No. 61 of 1945.

new trial should be ordered; what one has to look at is the strength of the inadmissible evidence, or the gravity of the misdirection or non-direction; where as in this case the matters complained of were serious, then the proper course was to have a new trial; it is not for an Appellate Court to consider the case for itself, and put themselves in the place of the jury.

I am entitled to succeed if I can show that the High Court was wrong on either of the points.

As to the misdirection and non-direction the strongest case against me is *Elahee Baksh*, (1866) 5 S.W.R. 80, (F.B.).

The following cases were referred to: *Makin's case*, (1894) A.C. 57: *Wafadar Khan*, v. *Queen Empress*, (1894) I.L.R. 21 Cal. 955; *Ali Fakir* v. *Queen Empress* (1897) I.L.R. 25 Cal. 230; *Taju Pramanick*, v. *Queen Empress*, (1898) 25 Cal. 711: *Sadhu Shaikh* v. *Empress*, (1900) 4 C.W.N. 576; *Emperor* v. *Smither*, (1902) 26 Mad. 1; *Emperor* v. *Ikramuddin*, (1917) 39 All. 348; *The Crown* v. *Bimal Parshad*, (1924) 6 Lahore 98: *Emperor* v. *Rajab Ali*, (1927) 31 C.W.N. 881: *Sarojkumar Chakrabarti* v. *Emperor*, (1932) I.L.R. 59 Cal. 1361: *Binayendra Chandra Pande* v. *Emperor*, (1936) I.L.R. 63 Cal. 929: *Mathews*, A.I.R. 1940 Lah. 87; *Harakchand*, A.I.R. 1941 Nag. 324.

These are all the authorities on the misdirection point.

Viscount Simon.—Is your proposition that once assuming that there has been a serious misdirection or non-direction, then the only course for the appeal Court is to send it back for re-trial?

Quass.—Yes, my Lord.

Viscount Simon.—Can the appellate Court dismiss the appeal when there has been serious misdirection? In the cases cited the Judges seem to have taken the view that the only course was to send it back.

Sir John Beaumont.—Any serious failure to comply with the terms of the Criminal Procedure Code, would vitiate the trial unless saved by section 537.

Quass.—Now I come to the question of misreception of evidence. I cannot say that in all cases a trial is vitiated by reception of inadmissible evidence or non-reception of admissible evidence. I am faced with the difficulties of the provisions of section 167 of the Indian Evidence Act; if there were no authorities in my favour I would have great difficulty in section 167, but there are a number of authorities mostly in my favour, but I cannot say that I support them.

Shaik Hazir v. *Emperor*, (1909) 14 C.W.N. 493; test laid down there was that the seriousness of the evidence admitted was to be considered.

Ramesh Chandra Das v. *Emperor*, (1919) I.L.R. 46 Cal. 895, and *Emperor* v. *Panchu Das*, (1920) I.L.R. 47 Cal. 671 (F.B.) referred to.

Viscount Simon.—As far as you are concerned you will succeed if we disagree with the High Court on either point.

Quass.—Yes, my Lord, as far as a new trial is concerned.

Finally to sum up I am saying that though we are dealing with different systems of jurisprudence, the same rule applies in England as in India.

The Full Bench in the present case arrived at their decision on the misdirection point on two grounds: 1. That failure of justice means that a guilty man has been acquitted, or an innocent man has been convicted. 2. That the powers of the High Court were the same whether there was a jury or not. In my submission both these grounds are wrong.

Subramania Ayyar v. *Emperor*, (1901) 25 Mad. 61, (P.C.) referred to.

The principle of *Makin's case* should be applied to trials in India. The Full Bench were wrong in limiting their answers to the questions submitted to it to cases in which section 449 of the Criminal Procedure Code apply, and that in any event no different principles should be applied to cases in which this section is invoked and to cases in which it is not invoked.

As to the words "failure of justice", in section 537 of the Code they ought not to be read as meaning a conviction that is wrong on the facts, but as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or misunderstanding of the law, making it impossible to say that a jury on a correct view of the law or properly directed would not have returned a different verdict and this should apply whether a case is within section 449 or not.

In my respectful submission a correct view would be this proposition:—"When in a murder reference and appeal, it is found that there has been serious instances of misdirection and non-direction of a jury, the High Court may not proceed to consider the evidence itself, but must order a retrial, unless the High Court is satisfied that despite such misdirection or non-direction, the case has in substance been properly presented to the jury.

Mackenna.—As to section 167 of the Indian Evidence Act, the words "in any case" include trial by jury; the words "if it shall appear to the Court", make the opinion of the Court the criterion by which the sufficiency of the evidence is decided. Once the High Court is satisfied that the admissible evidence clearly establishes the guilt of the accused, the High Court is not bound to enquire whether a reasonable jury would have found the accused guilty or not. Finally the words "in any case", lend themselves to no limitation.

As to the point on misdirection and non-direction.

Viscount Simon.—Would you say that a serious misdirection amounts to a miscarriage of justice, in the sense that there has been no fair trial at all; is that not different from when you have several items of evidence, a, b, c, d, and one such is wrongly admitted.

Mackenna.—Under section 423, if there is misdirection, the High Court can still dismiss the appeal if the High Court is satisfied in its own opinion that the accused was guilty, that is my proposition. The appellant says if misdirection, then if the High Court thinks that in its opinion a reasonable jury properly directed might have acquitted then the accused is entitled to a new trial. I deny this.

Sections 423 and 537, apply to appeals from conviction, acquittal, trial by jury or judge. As to "erroneous" in sub-sec. (2) of section 423 it means a wrong verdict in my submission.

Whatever the position under other sections of the Code, trials under section 307 etc., when the trial is under section 449 then High Court's powers are clearly defined. Misdirection cannot be said to have produced a failure of justice, when the ultimate tribunal as to facts namely the High Court, is of the opinion that on the facts the jury's verdict is right; under section 449 the High Court is the ultimate tribunal as to facts, they can review the facts, and find the accused guilty, if they are satisfied that the facts warrant such conviction, irrespective of what a jury would have done if properly directed.

Lord Macmillan.—Should we not confine ourselves to section 449; whatever else we say would be obiter?

Mackenna.—It will be of great importance if Your Lordships could make a wider pronouncement, in view of the fact that cases under section 449 are rare.

Sir John Beaumont.—Is your proposition that as long as the evidence is recorded, then the High Court can substitute its verdict irrespective of any irregularity, say a trial by jury instead of assessors?

Mackenna.—No, if the irregularity is gross as in Subramania Aiyar's case then it is not cured by section 537.

I shall deal now with the cases on this point. The following authorities were referred to. *Elahee Baksh In re*, (1866) 5 S.W.R. 80 (F.B.); *Emperor* v. *Smithers* (1902) 26 Mad. 1; *Queen Empress* v. *Ramchandra Govind Harshe*, (1895) 19 Bom. 749; *Ramchandra* v. *Emperor* A.I.R. 1933 Bom. 153; *Sheo Swarup* v. *King-Emperor*, (1934) 67 M.L.J. 664 : L.R. 61 I.A. 398 : I.L.R. 56 All. 645 (P.C.).

If Your Lordships are of the opinion that the High Court is wrong on one or the other of the points, then you should remit the case to a Divisional Bench after stating the correct view of the law and leave the question of a new trial to the High Court.

Quass.—I wish to say no more on section 167, of the Evidence Act. As to misdirection the respondent says that it is for the High Court whenever there is serious misdirection to review the facts and make up their mind as to the innocence or guilt of the prisoner. That is wrong whether under section 449 or not. It is true that under section 449 appeal lies on facts, that does not mean the High Court is the ultimate judge of facts.

"Erroneous", in section 423, means in the sense of being vitiated; it does not mean wrong on facts.

The prisoner is entitled to the right to a trial by jury; if the answer to the second question is right, he is deprived of that right.

Their Lordships' Judgment was delivered by

LORD MACMILLAN.—The appellant on 12th May, 1944, was convicted on a charge of murder and sentenced to death after a trial before the Sessions Judge of Ambala sitting with a jury of seven. They jury returned a verdict of guilty by a majority of four to three. There were other minor charges against the appellant on which he was also convicted, but it is unnecessary to refer to these. Sentence of death having been passed on the appellant the "proceedings," as required by section 374 of the Code of Criminal Procedure, were submitted for confirmation to the High Court of Judicature at Lahore. The appellant also appealed to the High Court against his conviction.

The case came before a Divisional Bench of the High Court consisting of the Chief Justice Sir Arthur Trevor Harries and Mr. Justice Teja Singh. After reviewing the evidence and the summing up of the Sessions Judge to the jury they came to the conclusion that certain material evidence had been improperly admitted at the trial and that the Judge had seriously misdirected the jury. The Court had then to consider what were its powers in this situation and what course it should adopt. Counsel for the appellant maintained that on both grounds the verdict of the jury should be set aside and a new trial ordered. Counsel for the Crown maintained that notwithstanding the defects in the proceedings the Court was entitled to examine for itself the whole proceedings including the evidence and should not set aside the verdict of the jury and order a new trial unless it was satisfied on a consideration of the whole case that the verdict was wrong and that there had been a failure of justice.

In view of the importance of the questions raised as to the powers of the High Court in such circumstances and as to the proper course to be pursued by it, and also in view of the divergent opinions expressed on this topic in a number of previous reported cases, the learned Judges of the Divisional Bench decided to refer to a Full Bench the two following questions :—

"(i) When in a murder reference and appeal it is found that inadmissible evidence has been admitted in a Jury trial, can this Court in view of section 167, Indian Evidence Act, and/or section 537, Criminal Procedure Code, exclude such evidence and maintain a conviction if the evidence remaining is sufficient to warrant it or must a re-trial be ordered ?

(ii) When in a murder reference and appeal it is found that there have been serious instances of misdirection and non-direction of a Jury, should this Court in view of section 537, Criminal Procedure Code proceed itself to consider the evidence and maintain a conviction if the evidence is sufficient or must a re-trial be ordered ?"

Those questions were considered by a Full Bench of five Judges presided over by the Chief Justice which on 11th December, 1944, delivered judgment[1], answering the questions as follows :—

"(i) Where inadmissible evidence has been admitted in a murder reference and appeal under section 449, Criminal Procedure Code, the High Court may, after excluding such evidence, maintain a conviction, provided the admissible evidence remaining clearly establishes the guilt of the accused."

"(ii) The Court in an appeal by an accused person under section 449, Criminal Procedure Code, can, where there has been a serious misdirection or non-direction, consider the evidence and maintain the conviction if the evidence clearly establishes the guilt of the accused."

The case was remitted with these answers to the Divisional Bench which on 8th January, 1945, dismissed the appellant's appeal and confirmed the sentence of death passed upon him.

By Order dated 3rd August, 1945, special leave to appeal *in forma pauperis* to His Majesty in Council was granted to the appellant on the advice of the Board, but "restricted to the two questions referred to the Full Bench by the Divisional Bench."

It will be observed that the answers returned by the Full Bench are narrower in scope than the questions referred to it, and are limited to cases under section 449 of the Criminal Procedure Code. This is explained by the circumstance that the case was one in which European and Indian British subjects were concerned and therefore came within the special provisions relating to such cases contained in Chapter XXXIII of the Code, and particularly the special provisions relating to appeal in section 449, which *inter alia* authorise an appeal on a matter of fact as well as on a matter of law in jury cases. The judgment of the Full Bench discusses with much learning and a full citation of authorities the whole ground covered by the questions referred to it but thought it right to limit its answers to the specific case, as to which, being a case under section 449, which allowed an appeal on fact as well as on law, it was in any event clear what the answers should be, whatever view might be taken with regard to appeals under other sections of the Code.

As the Order in Council grants leave to appeal on the two questions referred to the Full Bench and as it is desirable that the whole matters raised in these questions should be considered and decided their Lordships do not propose to confine themselves to the special case of appeals under section 449.

In India the verdict of a jury in a criminal case may come before the High Court for consideration in a variety of ways.

I. Under chapter XXIII, section 307, of the Criminal Procedure Code, if the trial judge disagrees with the verdict and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court "he shall submit the case accordingly recording the grounds of his opinion" and "shall not record judgment of acquittal or of conviction." The powers of the High Court in such a case are thus defined in sub-section (3) of the section :—

1. I.L.R. (1945) Lah. 290 (F.B.).

"In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal and subject thereto it shall after considering the entire evidence and after giving due weight to the opinion of the Sessions Judge and the jury acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and if it convicts him may pass such sentence as might have been passed by the Court of Session."

II. Under chapter XXVII, section 374, of the Code

"When the Court of Session passes sentence of death the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court."

In such a case the High Court, under section 376

"(a) may confirm the sentence or pass any other sentence warranted by law; or

(b) may annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him or order a new trial on the same or an amended charge; or

(c) may acquit the accused person."

III. Chapter XXXI of the Code deals with appeals generally, whether by the Public Prosecutor from an acquittal or by the accused from conviction and sentence. Section 418 (1) provides that

"an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury in which case the appeal shall lie on a matter of law only."

Section 423 defines the powers of the Appellate Court disposing of the appeal. The Court under sub-section (1) is to send for the record of the case, if not already before it, and "after perusing such record" and hearing parties

"the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may

(a) in an appeal from an order of acquittal reverse such order and direct that further inquiry be made or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction

(1) reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial; or

(2) alter the finding, maintaining the sentence or with or without altering the finding reduce the sentence; or

(3) with or without such reduction and with or without altering the finding alter the nature of the sentence but subject to the provisions of section 106, sub-section (3), not so as to enhance the same."

Sub-section (2) of section 423 is of special importance for the present purpose and is as follows:—

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him."

IV. Chapter XXXIII of the Code, which applies to the case in hand, contains special provisions relating to cases in which European and Indian British subjects are concerned and in relation to jury trials provides in section 449 (1) that

"notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court an appeal may lie to the High Court on a matter of fact as well as on a matter of law."

Chapter XLV, which is entitled "Of Irregular Proceedings," provides in section 537 as follows:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code;

* * * * * * *

(d) of any misdirection in any charge to a jury;

unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice."

To complete this citation of the statute law affecting revision and appeals in jury trials it is necessary to add the provision contained in section 167 of the Indian Evidence Act, 1892, which applies to all judicial proceedings in or before any Court, including jury trials. The section reads as follows :—

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that if the rejected evidence had been received it ought not to have varied the decision."

No one can read these statutory enactments without realising the wide disparity between the law of India and the law of England in their respective attitudes to the verdict of a jury in criminal cases. In India the law is purely the creation of statute, and the introduction of the system of jury trial among a people who had no previous experience of its working was not unnaturally accompanied with safeguards and modifications appropriate to such circumstances. In England on the other hand trial by jury, the palladium of British justice as Blackstone terms it, is an institution deeply rooted in the minds and habits of the people with which they have been familiar from time immemorial. It is therefore not surprising to find the verdict of a jury treated differently in Indian criminal legislation. To emphasise the difference it is enough to point out that the statute law in India in certain circumstances permits an appeal against a jury's verdict of acquittal and authorises the Appellate Court to substitute a conviction on its own consideration of the evidence. Time and again eminent judges in India have drawn attention to the importance of bearing these circumstances in mind and the danger of allowing preconceptions derived from English practice to influence the decision of Indian cases. (See for example, the observations of Jackson, J., in the case of *Elahee Buksh*.[1]) This is not to say that the verdict of a jury is to be lightly regarded in India. Far from it. The legislature has enjoined Appellate Courts expressly to pay regard to it. But at the same time it has thought it right and necessary in the circumstances of India to confer upon Appellate Courts extensive powers of over-ruling or modifying a verdict in the interests of the due administration of justice, confident that the Appellate Judges, who have not themselves seen and heard the witnesses, will not exercise lightly the responsible power entrusted to them.

The first question submitted relates to the effect of the misreception of evidence. It has been found by the High Court that in the present case material evidence was improperly admitted. What are the powers and what is the duty of the High Court in such circumstances? It was contended for the appellant that the evidence improperly admitted might have so seriously prejudiced the minds of the jury as to have brought about a failure of justice and that he was entitled on a new trial to have the verdict of a jury on proper evidence. To this submission section 167 of the Indian Evidence Act in their Lordships' opinion affords a complete and conclusive answer. The improper admission of evidence is thereby expressly declared not to be a ground of itself for a new trial. The Appellate Court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict. If the Appellate Court does not think that the admissible evidence in the case is sufficient to justify the verdict then it will not affirm the verdict and may adopt the course of ordering a new trial or take whatever other course is open to it. But the Appellate Court if satisfied that there is sufficient admissible evidence to justify the verdict is plainly entitled to uphold it. If the misreception of evidence is an irregularity within the meaning of section 537 of the Criminal Procedure Code, on which their Lordships find it unnecessary to pronounce an opinion, it plainly has not occasioned a failure of justice where, as here, the Appellate Court, obeying the injunction contained in section 167 of the Indian Evidence Act, has found that there is sufficient admissible evidence to justify the verdict. Their Lordships find themselves accordingly in agreement with the answer returned by the Full

1. (1866) 5 S. W. R. 80 at 94 (F.B.).

Bench to the first question addressed to it by the Divisional Bench subject to an amendment of the concluding words of the answer so as to read "provided the admissible evidence remaining is in the opinion of the Court sufficient clearly to establish the guilt of the accused." They see no need, however, to limit the answer to a murder reference and appeal under section 449 of the Code.

The second question requires more detailed consideration. The High Court has found that in his charge to the jury the learned Sessions Judge seriously misdirected them. Does this entitle the accused as of right to an order for a retrial? It will be observed that in the sections of the Criminal Procedure Code above quoted there is express reference to a misdirection, to a jury in two places, once in section 423 (2) and again in section 537. The guidance thereby given to the Appellate Court is in each case negative not positive. Under the earlier section the Court is enjoined not to reverse the jury's verdict unless it is of opinion that the verdict is "erroneous owing to a misdirection by the Judge or to a misundertstanding on the part of the jury of the law as laid down by him." Under the later section the Court is enjoined not to reverse or alter the jury's verdict on account of any misdirection in the Judge's charge unless such misdirection has in fact occasioned a failure of justice. While these injunctions are expressed negatively they may be said to be pregnant negatives implying that there is a case for reversing or altering the verdict of the jury when the Court is of opinion either that the verdict is erroneous owing to the Judge's misdirection or the jury's misunderstanding of the law laid down by him or that the misdirection has in fact occasioned a failure of justice. The primary duty of the Court on an appeal is indicated in section 423 (1). It is to consider with the record before it whether there is "sufficient ground for interfering." That there has been a misdirection is not of itself a sufficient ground to justify interference with the verdict. The Court must proceed to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has in fact occasioned a failure of justice. If the Court so finds then it has a plain justification for interfering and indeed a duty to do so.

The controversy which, as the reported cases show, has long existed in the High Courts of India has centred round the question whether the Appellate Court, in deciding whether there is sufficient ground for interfering with the verdict of a jury, particularly where there has been a misdirection by the Judge, has the right and duty to go into the merits of the case for itself and on its own consideration of the evidence to make up its mind whether the verdict was justified or not. On the one hand it has been said that the accused is entitled to have his guilt or innocence decided by the verdict of a jury and that the Appellate Court has no right to substitute its own judgment in place of a verdict by a jury. The powerful observations on this subject by Lord Chancellor Herschell in the case of *Makin* v. *Attorney-General for new South Wales*[1] are invoked in support of this view. On the other hand it is argued that it is impossible for the Court to perform the duty laid upon it by the Code without applying its own mind to the soundness of the verdict.

The argument that no man shall be convicted save by the verdict of a jury returned on competent evidence and under proper judicial direction loses much of its force so far as India is concerned when it is realised that in an appeal from an acquittal the Appellate Court under section 423 (1) (*a*) if it considers that there is sufficient ground for interfering may find the accused guilty and pass sentence upon him according to law. How it can do so without itself going into the whole merits of the case it is impossible to conceive.

Moreover in performing its duty under section 374, when a sentence of death is submitted to it for confirmation, the High Court of necessity is entitled and bound to consider the whole merits of the case for itself. How else could it decide, as it may do, to acquit the accused notwithstanding the jury's verdict of guilty? Similarly under section 307 where the trial judge who disagrees with the jury's verdict submits the case to the High Court it is plainly the duty of the High Court to go into

1. (1894) A.C. 57.

the whole case for itself in order to enable it to decide whether the accused should be acquitted or convicted. There is therefore nothing shocking in the estimation of the legislature of India in empowering an Appellate Court, notwithstanding the verdict of a jury, to reconsider the evidence for itself and arrive at a contrary conclusion. Under such a system arguments derived from English practice or from the Australian case above-mentioned are seen to be inapplicable and indeed misleading.

But it is said that whatever may be permissible under other sections of the Code, it is not permissible for the Appellate Court to go into the merits of the case in an appeal under chapter XXXI for section 418 enacts expressly that where there has been a trial by jury an appeal shall lie on a matter of law only. This, it is argued precludes the Appellate Court from entering upon the merits. It has already been pointed out that under section 423 the Appellate Court may on an appeal from an acquittal find the accused guilty. This power is not expressed to be inapplicable to cases where the acquittal has been by the verdict of a jury and if it is to be exercised would seem necessarily to involve the consideration of the whole case on the evidence. An appeal may be entertained only on a question of law, but once it has been held by the Appellate Court that there has been an error in law it is open to it to "interfere" with the jury's verdict and if it thinks that the error in law affords sufficient ground for doing so it will then proceed to consider which of the various forms of "interference" it will adopt. Section 423 clearly indicates that within its meaning a misdirection by the Judge falls within the category of error in law, for it contemplates in sub-section (2) that an appeal is competent on the ground of misdirection. But a misdirection having been found to have occurred it is not necessarily a ground for interference. It may have been of a more or less trivial character. But if it has led to an erroneous verdict being returned or to a failure of justice the statute plainly indicates that a case for interference has arisen. What form the interference shall take is left to the Court which is given a wide discretion. It need not order a re-trial. It may for example acquit the accused. To order a re-trial might well operate injustice in readily conceivable circumstances.

The question of the precise meaning of the word "erroneous" occurring in section 423 (2) has been much discussed. One view is that it means that the verdict is wrong on the merits. The other is that it means that the verdict has been vitiated by the misdirection irrespective of the merits, and that it is not for the Court to consider what judgment it would have given on the merits but what verdict a jury properly directed might have returned on the evidence. Their Lordships do not find it necessary to express an opinion upon this question of construction in view of the terms of section 537 which peremptorily precludes the Court from interfering with a jury's verdict on the ground of misdirection unless the misdirection has "in fact, occasioned a failure of justice." The words "in fact" were inserted by amendment to give emphasis to the injunction and it is noteworthy that the legislature took this step after two decisions by the High Court in Calcutta by which it had been held that it was not entitled in deciding whether there had been a failure of justice to go into the evidence for itself. (*Wafadar Khan*[1], and *Alik Fakir, In re*[2]). In their Lordships' opinion the Court in deciding whether there has been in fact a failure of justice in consequence of a misdirection is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.

In the exhaustive judgment of the Full Bench the authorities on the subject are very fully discussed. Their Lordships do not propose to analyse them again in detail. But they desire to draw special attention to the case of *Elahee Buksh*[3], the importance of which seems to have been to some extent overlooked in certain

1. (1894) 21 Cal. 955.
2. (1897) I.L.R. 25 Cal. 230.
3. (1866) 5 Sutherland's Weekly Repoter 80 (F.B.).

subsequent cases. The decision in *Elahee Buksh's case* was that of a Full Bench of five Judges of the High Court of Calcutta presided over by that learned and experienced Chief Justice, Sir Barnes Peacock. There the appellant was convicted and sentenced to transportation for the crime of dacoity. At the trial the Judge seriously misdirected the jury. The Divisional Bench sought guidance from the Full Bench. The provisions of the Criminal Code at that time were not identical with those now in force but were substantially the same. The learned Chief Justice in a careful judgment, concurred in by his colleagues, examined in all its bearings the question of the powers and duty of an Appellate Court in dealing with an appeal where misdirection has occurred. He points out that the statute does not compel the Court to send the case back for a new trial. " In determining," he says at p. 90, " whether the verdict ought to be set aside and a new trial granted for a defective summing-up of the evidence, it appears to me that the question to be considered is not whether upon a proper summing-up of the whole evidence a jury might possibly give a different verdict but whether the legitimate effect of the evidence would require a different verdict." He expressed his decision in formal propositions of which the second and third may be usefully quoted :—

"2. That for the reasons above stated there was error in law in the summing-up of the evidence which would warrant the Court in setting aside the verdict of guilty if the Court is satisfied that the prisoner was prejudiced by the error and that there has been a failure of justice.

3. That the verdict and conviction ought not to be set aside if the Court be of opinion that the verdict was warranted by the evidence and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the Judge with the aid of Assessors instead of by Jury."

On the point having again arisen in the case of *Wafadar Khan*[1] in 1894, a Calcutta Divisional Bench, to which the case of *Elahee Buksh* was surprisingly not cited, took the view that, there having been misdirection and the appeal being only on law, the Court had no right to go into the facts for itself. In reaching this decision the Court was largely influenced by the Australian case of *Makin*[2]. In 1897, in the case of *Ali Fakir*[3], a Divisional Bench in Calcutta, again without regard to the decision of the Full Bench in the case of *Elahee Buksh*[4], followed the decision in *Wafadar Khan's case*[1]. On the other hand there have been several cases in which the ruling in *Elahee Buksh's case*[4] has been given effect. It is sufficient to refer to the cases of *Smither*[5] and *Mathews*[6]. In the former the appeal was by the Public Prosecutor against an acquittal at a jury trial. There having been a misdirection by the Judge the Advocate-General contended that the Court was bound to order a re-trial. This contention was negatived. Benson, J., at p. 15 used these words : " We cannot say that there has in fact been a failure of justice without considering the credibility of the evidence and I think it would be unreasonable and contrary to the express direction of section 537 to hold that once misdirection, even though it be an important one, is established we are bound mechanically to order a re-trial even though in our judgment the evidence for the prosecution is untrustworthy." In the case of *Mathews*[6] the appellant by the verdict of a jury had been found guilty on three charges of cheating and fraud, and the accused appealed from the convictions. Blacker, J., after holding that there had been misdirection, reviewed a number of the conflicting authorities, though *Elahee Buksh's case*[4] was apparently not cited, and reached the conclusion that he was entitled himself " to examine the evidence to see whether the verdict was erroneous and has caused a failure of justice." Having done so he set aside the verdict and sentence and acquitted the appellant on one of the charges but affirmed the verdicts and sentences on the two other charges. Without finding it necessary to express any opinion with regard to the learned Judge's interpretation of the word " erroneous " their Lordships find themselves in agreement with his decision that he was entitled to examine the evidence for himself in order to see whether it justified the verdicts pronounced, or whether there had in fact been a failure of justice.

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1. (1894) I.L.R. 21 Cal. 955.
2. (1894) A.C. 57.
3. (1897) I.L.R. 25 Cal. 230.
4. (1866) 5 Suth. W. R. 80.
5. (1902) I.L.R. 26 Mad. 1.
6. A.I.R. 1940 Lah. 87.

Before parting with the case their Lordships would observe that the views of some of the Judges who have considered the matter in India have been much influenced by the circumstance that in some instances the appellant may appeal both on fact and on law while in others the appellant may appeal only on law. Their Lordships do not attach so much importance to this distinction nor do they find in it a determining feature. Consequently they do not think it necessary in agreeing with the answer of the Full Bench to the second question posed by the Divisional Bench in the present case to restrict the answer to appeals arising under section 449 which provides for an appeal both on fact and on law.

In the result, their Lordships will humbly advise His Majesty that the appeal be dismissed.

Solicitors for Appellant : *Douglas Grant and Dold.*

Solicitor for Respondent : *Solicitor, India Office.*

H.J.U./V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Nagpur.)*

PRESENT :—THE LORD CHANCELLOR, LORD WRIGHT, LORD DU PARCQ, LORD JUSTICE MORTON AND SIR JOHN BEAUMONT.

The King-Emperor .. *Appellant*†

v.

Vimlabai Deshpande and another .. *Respondents.*

Privy Council—Appeal—Competency—Order of High Court discharging a person under section 491, *Criminal Procedure Code, from custody—Competency of direct appeal to the Privy Council—Practice—Preliminary objection as to competency of appeal—If can be raised at the hearing, though leave granted without reserving power to challenge its competency —Defence of India Rules* (1939), *rule* 129 (1) *and* (4)—*Arrest under sub-rule* (1)—*Grounds of suspicion—Onus of proof on Police officer—Order for detention under sub-rule* (4) *in cases of invalid arrest under sub-rule* (1)—*Legality.*

The question whether an appeal lies direct to the Privy Council from an order of the High Court discharging a person from custody under section 491, Criminal Procedure Code, must be determined on the broad principle that appeals from decisions of Courts in the British Dominions and Dependencies to the King in Council are heard under the Royal Prerogative, and that the Prerogative can only be curtailed by force of an Act of Parliament, that is, by the King in Parliament. There is no Act of Parliament which prohibits, or authorises the prohibition of, an appeal to His Majesty in Council by a party aggrieved against an order discharging from custody under section 491, Criminal Procedure Code.

Even though special leave to appeal to the Privy Council has been given without reserving express power to challenge the competency of the appeal, it is open to the respondent to raise a preliminary objection at the hearing that no appeal was competent.

Where a Police officer makes an arrest under rule 129 (1) of the Defence of India Rules he is bound to prove to the satisfaction of the Court before whom the arrest is challenged that he had reasonable grounds of suspicion. Though he can arrest on mere suspicion, the suspicion must be reasonable, the exact words used being "any person whom he reasonably suspects."

If the Police officer fails to discharge the burden so laid upon him, any order made by the Provincial Government under rule 129 (4) of Defence of India Rules for the temporary custody of such a person would become invalid. The only substantive power which is conferred upon the Provincial Government by sub-rule (4) is a power to make such order as may appear necessary for the temporary custody of any person, not, be it noted, "arrested", but "arrested under this rule", that is on reasonable suspicion as to the person's activities. If there is no valid arrest under sub-rule (1) the power to make an order for temporary custody of the person concerned cannot arise. Hence the Provincial Government has no power to make an order for the temporary custody of a detenu whose arrest under sub-rule (1) was invalid.

The Judgment of the High Court reported in I.L.R. (1945) Nag. 6, affirmed.

Sir Thomas Strangman, K.C. and *B. Mackenna* for Appellant.

C. S. Rewcastle, K.C., S. P. Khambatta and *B. Sen* for Respondents.

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* I.L.R. (1945) Nag. 6.

† P.C. Appeal No. 83 of 1945. 7th May, 1946.

Rewcastle.—I wish to raise a preliminary objection as to the competency of this appeal.

In *Sibnath Banerjee's case* (1945) L.R. 72 I.A. 241, an appeal lay from an order of discharge made by a High Court in India under section 491 of the Code of Criminal Procedure to the Federal Court under section 205 of the Government of India Act, 1935, and from the Federal Court under section 208 of the same Act to the Privy Council. In that case Your Lordships held that in the ordinary course of events no appeal lay from an order of discharge made by a High Court under section 491 of the Code of Criminal Procedure, but that an exception was created by section 205 of the Act. This is a decision of the Board that apart from section 205 there lies no other appeal against an order of discharge made under section 491 of the Criminal Procedure Code; therefore is there in this case a right to resort to section 205? In my submission there is no such right. Assuming that section 205 did apply, then the appeal should have gone to the Federal Court. This Board will not entertain an appeal even under the Prerogative where there is a chain of Courts and you have missed one of them; this is supported by *Bhaya Mohammad Azim Khan* v. *Saadat Ali Khan*, (1939) L.R. 66 I.A. 160.

Lord Chancellor.—Can you cite me any case where leave was granted without qualification and then it has been revoked? The King Emperor has confirmed it here by an Order in Council.

Rewcastle.—There is no limit to the Prerogative; if this Board is satisfied now that there is no right of appeal, then I submit that it can advise His Majesty that the leave should be revoked. *Shevantibai* v. *Janardhan Raghunath*, (1944) 2 M.L.J. 218; L.R. 71 I.A. 142 and *Zahid Husain* v. *Mohammad Ismail*, (1930) L.R. 57 I.A. 186, referred to.

Strangman.—My friend says that unless you come under section 205 then there is no appeal against an order of discharge under section 491 of the Code of Criminal Procedure. I agree with him and say that this case does not come under section 205, but that does not make the appeal incompetent. (*Sarda Mahesh Prasad Singh* v. *Badri Lal*, (1936) L.R. 63 I.A. 207 and *Nadan* v. *The King* (1926) A.C. 482, referred to.) In fact the Privy Council has entertained appeals by the Crown against orders of discharge. There are two such cases *Attorney-General for Hong-Kong* v. *Kwok-A-Sing*, (1873) L.R. 5 P.C. 179 and *Reg* v. *Mount*, 1875 L.R. 6 P.C. 283; both these cases were referred to in *Cox* v. *Hakes*, (1890) 15 A.C. 506.

As to the actual appeal the whole matter hinges on the policeman's original suspicion, his suspicion at the time of arrest. He arrests under the provisions of rule 129, sub-rule (1), he makes a report under sub-rule (2). In this case the local Government did something after the arrest; they made a further order under the provisions of rule 129 (2) and (4). In my submission such order made by the Provincial Government under sub-rule (4) is valid whether or not the detenu had been validly arrested. Sub-rule (4) has to be amplified in some manner so as to include the case where a person originally arrested on insufficient evidence may be still held. Here the arrest was not made in bad faith; therefore the further order made under sub-rule (4) would be valid if in the light of circumstances known to the Government the arrest appeared to be proper.

Lord Wright.—No order was made under rule 26 in this case.

Lord Chancellor.—If you had a final order under rule 26 then perhaps your case may have been stronger. The affidavit of the Secretary of the Provincial Government makes no mention that the Police officer had any reasonable suspicion; it merely states that the Provincial Government had reasonable suspicion.

Liversidge's case, (1942) A.C. 206, referred to.

Mackenna followed for the Appellant.

Mackenna.—I approach the case from a slightly different angle, I abandon nothing said by my leader.

My submissions are: 1. That the High Court had no power to enquire into the question whether the Police officer's suspicions were reasonable or not. It is wrong to approach rule 129 without looking at rule 26. The two should be taken together; rule 129 applies to temporary custody, rule 26 to final order. When a final order is made under rule 26, then the High Court has no jurisdiction, then they have equally no right as to order under rule 129. The circumstances of the two rules are the same. The reasoning applicable in *Liversidge's case*, (1942) A.C. 206, is equally applicable to a case under rule 129.

2. In this case the Provincial Government did make an order under rule 129 (4). The power to call in question such an order is governed by section 16 of the Defence of India Act, 1939, which says "no order made in exercise of any power conferred by or under this Act shall be called in question in any Court. In my submission section 16 applies to an order under rule 129, sub-rule (4).

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal by special leave from an order of the High Court of Judicature at Nagpur made on the 29th September, 1944. The order was made by the High Court in purported exercise of the powers conferred on it by section 491 of the Code of Criminal Procedure, which enables High Courts to take action in the nature of *habeas corpus*. The order directed that the second respondent, Purushottam Yeshwant Deshpande (hereinafter called "the detenu"), should be set at liberty forthwith on the ground that his detention was illegal. In granting special leave to appeal, the Board imposed the two following conditions: (1) That the detenu should not in any event be re-arrested in respect of the matters to which the appeal relates, and (2) That the petitioner should pay the costs as

between solicitor and client incurred by the respondents both in opposing the petition and in the appeal.

At the outset counsel for the respondents contended that no appeal was competent. That such a contention is open at the hearing of an appeal, notwithstanding that special leave has been given without reserving express power to challenge the competency of the appeal, was established by two decisions of this Board, *Zahid Husain* v. *Mohammad Ismail*[1] and *Mukhlal Singh* v. *Kishunni Singh*[2]. In support of his argument that the appeal is incompetent counsel relied mainly on the well-known case of *Cox* v. *Hakes*[3] and a recent decision of this Board, *The King-Emperor* v. *Sibnath Banerji*[4]. In *Cox* v. *Hakes*[3], the House of Lords decided that in England no appeal lay from an order of discharge made on the return to a writ of *habeas corpus*. The question turned primarily on the construction of section 19 of the Judicature Act, 1873. In their speeches, both Lord Halsbury and Lord Herschell noticed two decisions of the Privy Council in *Attorney-General for Hong-Kong* v. *Kwok-A-Sing*[5] and *Reg* v. *Mount*[6] and pointed out that special considerations applied to appeals from Colonial Courts in which the Privy Council was tendering advice to His Majesty as to the exercise of the Prerogative. The case of *The King-Emperor* v. *Sibnath Banerji*[4] was one in which an appeal lay from an order of discharge made by a High Court in India under section 491 of the Code of Criminal Procedure to the Federal Court under section 205 of the Government of India Act, 1935, and from the Federal Court to the Privy Council under section 208, and it was held that the rule in *Cox* v. *Hakes*[3] had no application to such a case. In the present case, however, no appeal lay to the Federal Court under the Government of India Act, 1935, since no question was involved as to the interpretation of the Act or any Order-in-Council made thereunder, and the question for decision is whether an appeal lies direct to the Privy Council from an order of a High Court discharging a person from custody under section 491 of the Code of Criminal Procedure. The broad principle which must determine this question is that appeals from decisions of Courts in the British Dominions and Dependencies to the King in Council are heard under the Royal Prerogative, and that the Prerogative can only be curtailed by force of an Act of Parliament, that is, by the King in Parliament. There is no Act of Parliament which prohibits, or authorises the prohibition of, an appeal to His Majesty in Council by a party aggrieved against an order discharging from custody under section 491 of the Code of Criminal Procedure. In their Lordships' opinion, therefore, the preliminary objection fails.

Dealing with the merits of the matter, their Lordships think that the questions for decision lie within a narrow compass and depend on the construction of rule 129 of the Defence of India Rules, 1939, with which must be read rule 26. It will be convenient at the outset to set out the relevant provisions of those Rules.

"Rule 129.—(1) Any Police officer . . . . . may arrest without warrant any person whom he reasonably suspects of having acted . . . . .

(a) . . . . . in a manner prejudicial to the public safety or to the efficient prosecution of the war.

(2) Any officer who makes an arrest in pursuance of sub-rule (1) shall forthwith report the fact of such arrest to the Provincial Government and pending the receipt of the orders of the Provincial Government may, subject to the provisions of sub-rule (3), by order in writing, commit any person so arrested to such custody as the Provincial Government may by general or special order specify: Provided—

(i) that no person shall be detained in custody under this sub-rule for a period exceeding fifteen days without the order of the Provincial Government; and

(ii) that no person shall be detained in custody under this sub-rule for a period exceeding two months.

(4) On receipt of any report under the provisions of sub-rule (2) the Provincial Government may, in addition to making such order subject to the second proviso to sub-rule (2) as may appear

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1. (1930) 59 M.L.J. 10 : L.R. 57 I.A. 186 : I.L.R. 52 All. 277 (P.C.).
2. (1931) 59 M.L.J. 444 : L.R. 57 I.A. 279 : I.L.R. 10 Pat. 86 (P.C.).
3. (1890) 15 A. C. 506.
4. (1945) 2 M.L.J. 325 : 1945 F.L.J. 222 : L.R. 72 I.A. 241 (P.C.).
5. (1873) L.R. 5 P.C. 179.
6. (1875) L.R. 6 P.C. 283.

necessary for the temporary custody of any person arrested under this rule, make in exercise of any power conferred on it by any law for the time being in force, such final order as to his detention, release, residence or any other matter concerning him as may appear to the said Government in the circumstances of the case to be reasonable or necessary."

"Rule 26.—(1) The Central Government or the Provincial Government if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas, or the efficient prosecution of the war, it is necessary so to do, may make an order :

(b) directing that he be detained ;"

The relevant facts giving rise to this appeal can be briefly stated :

(a) On the 21st August, 1944, the detenu was arrested pursuant to an order given by the Deputy Inspector-General of Police, under rule 129. The arrest was made by a Police Officer, K. C. Diwakar.

(b) On the 22nd August, under an order signed by the said K. C. Diwakar, the detenu was committed to the custody of the Superintendent, Central Gaol, Nagpur. The order was expressed to be made under the powers conferred by sub-rule (2) of rule 129.

(c) On the 23rd August, a report of the arrest was made to the Provincial Government as required by sub-rule (2).

(d) On the 26th August, the Provincial Government, purporting to act under sub-rule (4) of rule 129, directed that the detenu be detained in police custody for a period expiring on the 4th September, 1944.

(e) On the 2nd September, 1944, the Provincial Government, purporting to act under sub-rules (2) and (4) of rule 129, directed that the detenu should be detained in police custody for a further period of 15 days from the 5th September, 1944. A further order was made by Government on the 19th September, 1944, for a further extension of the period of detention, but as this order was made after the hearing in the High Court, such order cannot affect the position.

(f) In the meantime, namely, on the 25th August, the detenu's wife, who is the first respondent, made application to the High Court under section 491 of the Code of Criminal Procedure, complaining that the detention of the detenu was illegal and improper. This application was supported by certain affidavits made by Waman Deshpande, a nephew of the detenu alleging, amongst other things, that the detenu had been interrogated by the police whilst in prison, that he had been questioned only about one Inamdar, a former employee of the detenu who was alleged to have been concerned in a dacoity committed in the Province of Bombay, and that no questions were ever put to the detenu about any activities which could have brought him within the operation of rule 129 of the Defence of India Rules.

(g) No evidence was filed by the Police Officer who arrested the detenu, or by the Deputy Inspector-General of Police on whose orders the arrest was made, and the only evidence filed on behalf of the Provincial Government dealing with the grounds of suspicion against the detenu was an affidavit sworn by the Chief Secretary of the Provincial Government on the 10th September, 1944, which said that the report of the arrest of the detenu had been received by the Provincial Government on the 23rd August, and that it revealed reasonable grounds for suspecting that the detenu was actively associated with certain persons engaged in underground activities calculated to prejudice the public safety and efficient prosecution of the war, and in the opinion of the Provincial Government there were reasons to suspect that they had already acted in a manner which had prejudiced the public safety. It will be noticed that this affidavit contains no allegation that the detenu himself had been engaged in any subversive activities, or even that he was aware of such activities on the part of his associates.

(h) The application was heard by the High Court of Nagpur on the 11th September, and judgment was given on the 29th September, holding that the detention of the detenu was illegal, and directing that he be set at liberty forthwith.

The two questions which in their Lordships' view arise on this appeal are :

(i) Where a Police Officer makes an arrest under rule 129 (1) of the Defence of India Rules, is he bound to prove to the satisfaction of a Court before whom the arrest is challenged that he had reasonable grounds of suspicion ?

(ii) If he is so bound and fails to discharge the burden laid upon him, is an order made by the Provincial Government under rule 129 (4) for the temporary custody of a person arrested valid notwithstanding that the arrest was invalid ?

Upon the first question it is important to notice the differences between rule 26 and rule 129. Under the former rule an order of detention can be made only by the Central or Provincial Government, though this power may be delegated under the Defence of India Act ; and the Government may make an order of detention if it is satisfied with respect to any particular person that, with a view to preventing him from indulging in the subversive activities specified, it is necessary so to do. It is to be noticed that the Government must be satisfied, mere suspicion is not enough, but there is no qualifying adverb such as " reasonably " or " honestly " attached to the word " satisfied." On the other hand, under rule 129, any Police Officer can arrest on mere suspicion, but the suspicion must be reasonable, the exact words being " any person whom he reasonably suspects." As the High Court noticed in their judgment, the House of Lords, in the case of *Shearer* v. *Shields*[1], had to construe a provision in the Glasgow Police Act authorising constables to arrest if they had reasonable grounds of suspicion, and the House held that the burden rested upon the constable concerned to show that his suspicion was reasonable and his act therefore justified. Their Lordships think that the same result must follow under rule 129. Reliance was placed by the appellant on *Liversidge's case*[2], but as the High Court again noticed, there are two very material distinctions between that case and the present one. In the first place, authority empowered to arrest under the Defence of the Realm Act is a high officer of state, namely, the Home Secretary, and not a mere Police Officer ; and in the second place the House of Lords was impressed with the obvious inconvenience and danger to the public which might ensue if the Home Secretary was bound to disclose confidential information on which he had acted. In India this danger is very largely mitigated by the existence of rule 26 under which the Government can act whenever it is satisfied as to the matters mentioned in the rule. Cases in India under the Defence of India Rules which may involve disclosure of secret and confidential information will arise only in cases lying in the border-land between the Police being suspicious, and Government being satisfied, as to a person's subversive activities, and such cases are hardly likely in practice to be either numerous or serious.

In their Lordships' opinion, therefore, the High Court was right in holding that the burden lay upon the Police Officer to satisfy the Court that his suspicions were reasonable, and it is plain that on the evidence he had not discharged that burden.

The second question turns on the construction of sub-rule (4) of rule 129, and was strongly pressed by Sir Thomas Strangman on behalf of the appellant. His contention was that the Provincial Government, acting under the power conferred by sub-rule (4), had made orders for the temporary custody of the detenu which were on their face unobjectionable, and that such orders were valid whether or not the detenu had been validly arrested. Counsel felt the difficulty of maintaining that an order for detention would be valid if the arrest had been made in bad faith, which he submitted was not the case which he had to meet, and he suggested that an order for custody would be valid if in the light of circumstances known to the Government the arrest appeared to be proper. But the language of sub-rule (4) affords no warrant for any such distinction. If a valid order for custody can be made, although the arrest was invalid, it can make no difference whether the illegality of the arrest was due to an honest error or to an act of bad faith.

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1. (1914) A.C. 808. 2. (1942) A.C. 206.

Sub-rule (4) is curiously expressed. It provides that on the receipt of a report under sub-rule (2) which, be it noted, need only be as to the fact of arrest, the Provincial Government may, in addition to making such order as may appear necessary for the temporary custody of any person arrested under the rule, make, in exercise of any power conferred on it by any law for the time being in force, such final order as to his detention as may appear to Government to be reasonable or necessary. Reference to any law for the time being in force introduces the powers conferred by rule 26 and possibly other provisions of law, though no such provisions were brought to their Lordships' attention. The sub-rule is so framed as to suggest that what is really being conferred on Government is power to make a final order, power to make an order for temporary custody being expressed parenthetically. But when the language is looked at carefully it is plain that the sub-rule does not purport to enlarge the powers which Government may possess under any law for the time being in force, and this part of the rule seems designed only to indicate that Government can take advantage of a person being in temporary custody when making a final order under any other law. But a final order for detention can be made under rule 26 on Government being satisfied as in the rule mentioned, and its validity depends in no way upon the person against whom the order is made being already under arrest. The only substantive power which is conferred upon the Provincial Government by sub-rule (4) is a power to make such order as may appear necessary for the temporary custody of any person, not, be it noted, "arrested", but "arrested under this rule", that is on reasonable suspicion as to the person's activities. If no arrest was made under the rule, the power to make an order for temporary custody of the detenu never arose. Their Lordships therefore agree with the High Court in thinking that the Provincial Government had no power to make an order for the temporary custody of the detenu, whose arrest under sub-rule (1) was invalid.

Mr. MacKenna, for the appellant, further relied on section 16, sub-section (1) of the Defence of India Act, 1939, which provides "no order made in exercise of any power conferred by or under this Act shall be called in question in any Court". But this argument only raises the same question in a different form. If the orders made by the Police or the Provincial Government were invalid they were not made in exercise of a power conferred by the Act.

The learned judges of the High Court in their judgment—which is not open to criticism on the ground of undue brevity—discussed various other aspects of the case, and their Lordships must not be taken as being in agreement with all the opinions expressed by the learned judges. Upon the view which their Lordships have expressed that the Provincial Government have failed to prove that the arrest of the detenu was justified, and that the orders for custody made against him were illegal, the High Court was plainly justified in making the order which it did make under section 491 of the Code of Criminal Procedure.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the respondent's costs of this appeal as between solicitor and client.

Solicitor for Appellant : *Solicitor, India Office.*

Solicitors for Respondents : *Hy. S. L. Polak & Co.*

H.J.U./V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

B. Nemichand Sowcar .. *Appellant**

v.

Y. V. Rao .. *Respondent.*

Civil Procedure Code (*V of* 1908), *section* 13 (b)—*Decree of foreign Court against absent defendant by consent of plaintiff and remaining defendant without hearing any evidence—Decree not one given on merits.*

Where in a suit in a foreign Court against two defendants the real issue between the parties was as to which of the defendants was in possession of the goods in dispute and liable to surrender them to the plaintiff and one of the defendants being absent at the time of the hearing a decree is passed against the absent defendant alone by consent of the plaintiff and the other defendant without hearing any evidence from the plaintiff, the decree is not a decree passed on the merits of the case within the meaning of section 13 (*b*) of the Civil Procedure Code so as to bind the absent defendant.

Appeal against the order of the District Court, Anantapur, dated 19th July, 1945, in A.S. No. 18 of 1941 preferred against the order of the Court of the District Munsiff, Penukonda, in E.P. No. 263 of 1941 in E.P. No. 76 of 1941 in O.S. No. 15 of 1939-40 (Additional Sub-Court, Kolar).

T. M. Venugopal Mudaliar for Appellant.

K. Vallabheswara Rao for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a petition under sections 13, 47 and 151 of the Civil Procedure Code in Suit No. 15 of 1939-40, Sub-Court, Kolar. That suit was decreed in circumstances which disregard the provisions of section 13 (*b*), Civil Procedure Code, in that the decree was not given on the merits of the case.

It is unnecessary to go into the background of the disputes between the parties. It is enough to say that the appellant and the respondent were interested one way or another, in certain cinema machinery and accessories. After disputes had arisen as to the ownership of these goods, it appears that the respondent took them into the State of Mysore, where, according to him, the goods passed into the possession or ownership of another person, one Kanduri Lakshmayya. The appellant there filed a suit against the respondent and K. Lakshmayya. There can be no doubt that the respondent submitted to the jurisdiction of the Kolar Court. His written statement and other documents said in effect that he was no longer in possession of the goods and that they were in the possession of the second defendant. The second defendant in his turn said that some, at any rate, of the goods remained in the possession of the first defendant.

On the day fixed for the hearing of the case, the respondent (first defendant), was not present and I am told that his advocate reported "no instructions." The Subordinate Judge without hearing any evidence passed an order, Ex. P-4. This order purports to show that there was appearance by counsel on behalf of the plaintiff and of the second defendant only. It states that the plaintiff's advocate represented that the plaintiff had given up his claim to certain items. Then it goes on to say,

> "Thereafter both sides say that there may be a decree against only the first defendant as prayed for in the plaint for all the articles described in the inventory prepared by the commissioner except those given up by plaintiff to-day . . . . The suit is decreed as prayed for only against first defendant for all the articles described in the Commissioner's inventory except those given up by plaintiff to-day."

The first defendant was then made liable for costs which amounted to Rs. 476-6-0.

In due course the plaintiff attempted to execute this decree within the jurisdiction of this Court. The first defendant objected and successfully in both the lower Courts that the decree was not given on the merits of the case. Hence this appeal by the plaintiff-decree-holder.

I am in agreement with the judgment of the lower Courts. It is well settled that a decree passed in this way without any evidence being given cannot be valid. In *Venkatachalam Chetti* v. *Pichai Ammal*[1], a decree given in circumstances almost identical with the present one was held to be valid because evidence had been given by the plaintiff. In *Sundarm Pillai* v. *Kandasami Pillai*[2], a similar case to this,

*A.A.A.O. No. 315 of 1945. 29th March, 1946.

1. (1920) M.W.N. 412.
2. (1941) 1 M.L.J. 140.

the necessity for the giving of evidence was emphasized by King, J., at page 143. There the question was whether the defendant had submitted to the Court's jurisdiction and it was held, that he had done so by filing a written statement. It was pointed out,

"That the decree which was nevertheless given in his absence was not given until the plaintiff had actually been examined in the witness box. No doubt his examination was formal and brief and was not subjected to cross-examination but it cannot I think be successfully argued that the decree was based upon the fact of the failure of the defendant to appear, and must be deemed to have been based upon the evidence given by the plaintiff."

In the present case, had the plaintiff given sufficient evidence to cover the content of his plaint, no objection whatever could have been raised to the decree.

The plaintiff may have fallen into a trap, in assenting to the second defendant's suggestion that the absent first defendant should take the entire blame. Nevertheless as was pointed out in *Keymer* v. *Viswanatham Reddi*[1], a Privy Council case, sub-section (*b*) to section 13 refers to cases where for one reason or other, the controversy raised in the action has not in fact been the subject of direct adjudication by the Court.

It was impossible in this case for the foreign Court to adjudicate on the real issue between these parties namely who was in possession and therefore liable to surrender these goods, without hearing any evidence from the plaintiff.

In these circumstances, the case was not tried on the merits and this appeal must fail and is dismissed with costs.

V.S. — *Appeal dismissed.*

[THE FEDERAL COURT OF INDIA.]

[On appeal from the High Court of Judicature at Madras.][2]

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLAH KHAN, JJ.

Manikkasundara Bhattar and others .. *Appellants**

v.

R. S. Nayudu and others .. *Respondents.*

The Advocate-General of Madras .. *Intervener.*

Government of India Act (1935), *Schedule VII, List II, Entry* 34 *and Madras Temple Entry Authorisation and Indemnity Act* (*XXII of* 1939)—*Scope of the meaning of "charities" in entry* 34—*Provincial Legislation if covered by that entry—Section* 298 *of the Constitution Act, if applies.*

Entry No. 34 of List II of the seventh schedule to the Government of India Act, 1935, opens with the term "charities" a term of very wide legal significance in the law of England, Ireland, Scotland and British India. A power to legislate in respect of "charities" would always clearly include power to legislate in respect of "charitable institutions" and "charitable endowments." Nothing can be added to the scope or ambit of the power to legislate in respect of "charities" by the addition of the words "charitable institutions" and "charitable endowments." These additional phrases in Entry No. 34 are only illustrative of the directions, which the power, the really enabling power, to legislate in respect of charities may, amongst others, take. The word "charities" is an appropriate generic term of wide scope and meaning apt to include all public, secular, charitable and religious trusts and institutions recognised as such by British Indian Law, and a power to legislate in respect of "charities" will include a power to legislate in respect of all matters connected with religious charities and institutions. The reference to "religious" endowments will not in the context in which it is used cut down the wide scope of the power of legislation conferred by the opening word of the Entry any more than the addition of the words charitable institutions and charitable endowments. It follows that the Madras Provincial Legislature had power by virtue of Entry No. 34 in List II to legislate in respect of religious institutions within the Province of Madras in the manner in which it purported to legislate by the Madras Temple Entry Authorisation and Indemnity Act, 1939. The said Act is hence a valid enactment.

Section 298 of the Constitution Act does not apply to the case. The challenged legislation does not amount to a prohibition of the holding by anybody of any property on grounds only of religion. If sub-section (1) does not apply, sub-section (2) cannot apply.

In considering the scope of the legislative powers of the Provincial Government, very little assistance can be derived from a consideration of such powers prior to the Constitution Act of 1935. The whole scheme of legislative powers was entirely different under the earlier Government of India

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1. (1916) 32 M.L.J. 35 : L.R. 44 I.A. 6 : I.L.R. 40 Mad. 112 (P.C.).
2. (1945) F.L.J. 53 : (1945) 1 M.L.J. 372 : I.L.R. (1945) Mad. 697.

* Civil Appeal No. 3 of 1945. 27th March, 1946.

Act. The basic conception underlying the earlier Act was that of a unitary state. The scheme of the Constitution Act of 1935 is utterly dissimilar with its structure for a federal state and its strict provisions for exclusive legislative powers in the Central and Provincial Legislatures in certain subjects and concurrent legislative powers of both on others.

Rao Sahib N. Natesa Aiyar, Advocate, Federal Court, and *T. L. Venkatarama Iyer*, Advocate, High Court, Madras, instructed by *Naunit Lal*, Agent, for Appellants.

Sir Alladi Krishnaswami Iyer, Senior Advocate, Federal Court (*N. Rajagopala Iyengar*, Advocate, Federal Court, and *Alladi Kuppuswami*, Advocate, High Court, Madras, with him) instructed by *Ganpat Rai*, Agent, for Respondents Nos. 1-8.

Respondent No. 9 was not represented.

K. Rajah Iyer, Advocate-General of Madras (*T. A. Ramaswami Reddi*, Advocate, Federal Court, with him) instructed by *Ganpat Rai*, Agent, for Intervener.

The Judgment of the Court was delivered by

The Chief Justice.—The events which led to the enactment by the Madras Provincial Legislature of the Madras Temple Entry Authorisation and Indemnity Act, 1939 (Madras Act No. XXII of 1939), the validity of which is called in question in this appeal, took place on the 8th July, 1939. On that date, certain members of the excluded classes, including respondents 2 to 6, led by the Advocate-President and Secretary of the local Harijana Seva Sanga (respondents 7 and 8) entered and offered worship from the *Ardhamantapam* in the temple of Sri Minakshi Sundareswaral Devastanam at Madura in the Province of Madras. Their entry and worship was not obstructed by the first respondent, the Executive Officer and Trustee of the temple. Their worship was aided by the ninth respondent, a temple Bhattar. These actions of the respondents caused grave offence to many other Hindus, including the appellants, as amounting to a most serious defilement of the temple. Immediate protests were made, followed by an action started by the appellants and others in the Court of the Subordinate Judge of Madura (O.S. No. 48 of 1939) by a plaint dated the 13th July, 1939. The reliefs claimed in the action were that the first respondent should be directed to cause the requisite purification and ritual ceremonies to be duly performed, that the respondents should pay the expenses of such ceremonies, and that various injunctions should be granted against the respondents to prevent any repetition of such events as had taken place on the 8th July, 1939.

On the 11th September, 1939, the Madras Temple Entry Authorisation and Indemnity Act, 1939 (hereinafter referred to as "the Act"), having been assented to by the Governor-General on the 4th September, 1939, was first published in the Fort St. George Gazette and thereupon *prima facie* became law. On the 18th September, 1939, one of the respondents took objection in the said action that by virtue of the Act the action was no longer maintainable. Accordingly, on the 26th September, 1939, the Subordinate Judge settled that the question whether the suit was barred by the Act should be tried as a preliminary issue. On the trial of the issue, the validity of the Act was challenged, on the ground that it went beyond the legislative powers conferred on the Legislature of Madras by the Government of India Act, 1935. On the 3rd April, 1940, the Subordinate Judge held that the Act was validly enacted and that it operated to bar the main claims in the action. He went on, however, to hold that it might have to be decided in the action, from what places within the temple the various sections of the Hindu community could properly worship, and he accordingly directed that the respondents should file written statements setting out their case on those matters. After written statements had been filed and various interlocutory applications had been made and disposed of, the suit was finally heard in the Court of the Subordinate Judge of Madura in January, 1942. By that time Mr. R. Rajagopala Ayyar had succeeded as Principal Subordinate Judge, and on the 26th January, 1942, he dismissed the action in its entirety, accepting his predecessor's decision as to the validity of the Act, but taking the view that on the plaint no question was raised for determination by the Court as to the places within the temple from which different sections of

the Hindu community could properly worship. From this decision the appellants appealed to the District Judge, Madura. On the 26th June, 1943, the District Judge dismissed the appeal. The appellants then appealed to the High Court of Madras. The appeal was heard on the 7th and 8th December, 1944, by Leach, C.J. and Shahab-ud-din, J., and judgment was delivered on the 15th December, 1944, dismissing the appeal.[1] The learned Judges held that by virtue of Entry No. 34 in List II (The Provincial Legislative List) or Entry No. 9 in List III (The Concurrent Legislative List) in the Seventh Schedule to the Government of India Act, 1935, the Madras Provincial Legislature had power to enact the Act in question and that arguments to the contrary on behalf of the appellants, including an argument based on section 298 of the Constitution Act, were ill-founded. The learned Judges also agreed with the decisions of the Courts below that no question was raised by the plaint for a decision by the Court as to places within the temple which the various communities should use for the purpose of worship. Having regard to the question raised as to the validity of the Act, the learned Judges granted a certificate under section 205 of the Government of India Act, 1935. By petition dated the 13th March, 1945, the appellants appealed to this Court from the said decision of the Madras High Court.

In this appeal we have had the benefit of very full and learned arguments from counsel for the appellants and the respondents and from the Advocate-General of Madras as intervener, in which the arguments advanced in the High Court have again been put forward and elaborated. We do not, however, propose to deal with all the arguments at length. In our judgment the matter can best be concluded and the case decided on the construction of Entry No. 34 of List II in the Seventh Schedule to the Government of India Act, 1935. That entry is in these words :—

"34. Charities and charitable institutions; charitable and religious endowments"

Summarising the main arguments on the construction of this entry put forward on behalf of the appellants, it was submitted by counsel for the appellants that having regard to the introduction in the latter part of the entry of the distinction between charitable and religious endowments, only a narrow meaning, excluding religious charities and religious institutions, could be given to the words "charities" and "charitable" in the earlier part of the entry. In this connection counsel for the appellants also pressed the principle referred to in Maxwell on the Interpretation of Statutes (8th Ed.), page 283, that when two words or expressions are coupled together, one of which generally includes the other, it is obvious that the more general term is used in a meaning excluding the specific one. Counsel further urged that from the express reference to "religious endowments" in entry No. 34, following on the express reference in entry No. 33 to "religious" societies and associations amongst the unincorporated societies and associations therein referred to, it must be presumed that when Parliament intended in List II to give to Provincial Legislatures exclusive legislative powers in respect of religious matters, it did so by express use of the word "religious". These arguments were reinforced by the submission that the narrow construction of the words "chatities" and "charitable institutions" in entry No. 34 was in accordance with a long course of legislative practice in British India, by which in enactments an express distinction had often been drawn between religious and other charitable trusts, purposes, endowments and so forth. Reference was made to the Religious Endowments Act (Act No. XX) of 1863; the Charitable Endowments Act (Act No. VI) of 1890, particularly the definition of "charitable purpose" in section 2; section 539 of the Code of Civil Procedure of 1877 ("trust created for public charitable purposes"); section 539 of the Code of Civil Procedure of 1882 ("trust created for public, charitable and religious purposes"); section 92 of the Code of Civil Procedure of 1908 ("trust created for public purposes of a charitable or religious nature"); the Religious Societies Act (Act No. I) of 1880; the amendment to section 10 of

1. (1945) F.L.J. 53 : (1945) 1 M.L.J. 372 : I.L.R. (1945) Mad. 697.

the Indian Limitation Act (Act No. IX) of 1908 made by section 2 of the Indian Limitation (Amendment) Act (Act No. I) of 1929; section 48 of the Administrator-General's Act (Act No. III) of 1913 ("religious, charitable and other objects"); the Charitable and Religious Trusts Act (Act No. XIV) of 1920; section 4 (3) (*i*) of the Indian Income-tax Act (Act No. XI) of 1922; sections 2 (*a*) and (3) (*f*) of the Mussalman Wakf Act (Act No. XLII) of 1923; section 118 of the Indian Succession Act (Act No. XXXIX) of 1925; and the Madras Hindu Religious Endowments Act (Act No. II) of 1927. It was further argued that an intention to impose a limitation on the right of Provinces to legislate in respect of religious institutions and matters, other than religious endowments or religious societies and associations, might properly be ascribed to Parliament when it passed the Act of 1935, having regard to the fact that the only subjects of this nature included by the Devolution Rules in the list of Provincial subjects prior to 1935 were "Religious and Charitable Endowments" (entry No. 23).

Dealing at once with the last point, we feel that very little assistance can be derived from a consideration of the legislative powers of the Provincial Governments prior to the Government of India Act, 1935. The whole scheme of legislative powers was entirely different under the previous Government of India Act. The basic conception underlying the previous Government of India Act was that of a unitary state. The Devolution Rules were only made "for the purpose of distinguishing the functions of local governments and local legislatures from the functions of the Governor-General in Council and the Indian legislature" (section 45-A). The legislative power of the local legislature of any Province was based on the wide and historic power to make laws for the peace and good government of the territories for the time being constituting that Province [section 80-A (1)]. The proviso to section 80-A preserved the validity by subsequent assent of the Governor-General of any enactment of a local legislature which should not have been enacted without the previous sanction of the Governor-General and section 84 (2) prevented the validity of any local Act being impugned in a Court of law on the ground that the Act affected a Central subject. The scheme of the Government of India Act, 1935, is utterly dissimilar with its structure for a federal state and its strict provisions for exclusive legislative powers in the Central Legislature on some subjects, exclusive legislative powers in the Provincial Legislatures on other subjects, and concurrent legislative powers of both Central and Provincial Legislatures on others. It may well be that the fact that entry No. 23 did appear in the list of Provincial subjects in the Devolution Rules may explain why it was thought advisable to add to the words "charities and charitable institutions" in Entry No. 34 in List II in the Seventh Schedule to the Government of India Act, 1935, the same words, *viz*., "religious and charitable endowments" that had appeared in Entry No. 23. Omission of them might have raised a doubt as to the power of Provincial Legislatures to legislate in respect of religious and charitable endowments. Beyond that, it seems to us impossible to deduce anything with any certainty from the scheme of the previous Government of India Act. We prefer to address ourselves to the task of construing Entry No. 34 as we find it in the Government of India Act, 1935, having particular regard to its context in and the other provisions of that Act.

It is true that the general principle referred to earlier in this judgment and taken from Maxwell on the Interpretation of Statutes may often properly be applied. But all such general principles of construction must yield to definite indications in the context that the portions of an enactment to be construed have not been drafted on the basis of any such principle. In our opinion it is only necessary to consider in detail a number of entries in the Lists in the Seventh Schedule to come to the conclusion that so far from the principle referred to having been kept in view throughout the drafting of these Lists, a very different principle has in fact been adopted in a large number of cases. In such last mentioned cases, it seems to us that the entries start with the use of some term or phrase of very general and far-reaching conception, and that then such term or phrase is followed by a number

of words or phrases with meanings which might well be included in the meaning of the opening term or phrase, if that had been left to stand alone, or with meanings indicating a somewhat different approach to the subject of legislation intended to be included in the opening term or phrase. Such additional words and phrases are added for the purpose of removing doubts as to the wide scope of the meaning of the opening term or phrase. The subsequent words and phrases are not intended to limit the ambit of the opening general term or phrase but rather to illustrate the scope and objects of the legislation envisaged as comprised in the opening term or phrase. In List I, Entries Nos. 3, 7, 20 and 33; in List II, Entries Nos. 4, 13, 18, 19, 20, 21 and 27; in List III, Entries Nos. 10, 18 and 27, may all be referred to as instances of entries where the meaning of the opening general term or phrase is not intended to be cut down by anything that follows, unless expressly so provided, as for instance by the last words of Entry No. 10 of List III. In some instances, that this is the proper principle of construction of entries in the Lists is made clear by the opening term or phrase being followed by the expression "that is to say" or the use of the word "including". But these additional helps to construction are by no means always used in entries of this description. *Cf.* Entry No. 27 in List III.

Entry No. 34 of List II opens with the term "charities" a term of very wide legal significance in the law of England, Ireland, Scotland and British India. A power to legislate in respect of "charities" would in our judgment always clearly include power to legislate in respect of "charitable institutions" and "charitable endowments." Nothing can be added to the scope or ambit of the power to legislate in respect of "charities" by the addition of the words "charitable institutions" and "charitable endowments." On the other hand, if these additional phrases were to be construed as conferring powers of legislation separate and distinct from the power to legislate in respect of charities, it would indeed be difficult to delimit what would be within the scope of the limited power to legislate in respect of charities in this narrow sense. In our judgment the additional phrases "charitable institutions" and "charitable endowments" in Entry No. 34 are only illustrative of the directions, which the power, the really enabling power, to legislate in respect of charities may, amongst others, take. Is there any reason why the same effect should not be given to the phrase "religious endowments" also? Why it should not merely be another illustration of the direction in which the general power of legislating in respect of charities may be exercised?

We appreciate the argument based on the legislative practice relied upon by the appellants that for many years, at any rate from 1863 onwards, many enactments have been so drawn as to indicate expressly when religious as well as, or as opposed to, secular charitable trusts, purposes, trustees, institutions, or societies are or are not made the subject or object of the legislation in question. This has generally been done, for some very specific reason, as for instance for the purpose of securing that religious trusts, trustees, endowments or institutions shall be treated separately and differently from secular trusts, trustees, endowments and institutions as in the Religious Endowments Act of 1863, or to ensure that they shall all be treated in the same way, in cases where doubts have been or might be cast on the scope of the legislation as in section 539 of the Code of Civil Procedure of 1882. But the very fact that the distinction has been expressly so often made in legislative enactments indicates that fundamentally the scope and meaning of the terms "charity" and "charities" may be at least as comprehensive in British Indian law of religious charities and institutions, or charities and institutions for religious purposes, as it is in English Law. The express inclusion of "religious endowments" in entry No. 34 will in this view be an indication that "charities" is here used in its most comprehensive sense. The position appears to us conveniently set out in para 782 of Mayne on Hindu Law and Usage (10th Ed.) at pages 913 and 914:

"According to English law, 'charitable trusts' in the legal sense comprise four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion and trusts for other purposes beneficial to the community not falling under any of the preceding heads. All charities to be administered by the Court must fall within one or other of

these divisions but not every object which falls within those divisions is charitable unless it is of a public nature, intended to benefit the community or some part of it and not merely private individuals or a class of private individuals. The Courts in India have, in relation to Hindu wills and gifts, adopted the technical meaning of charitable trusts and charitable purposes which the Courts in England have placed upon the term 'charity' in the statute of Elizabeth. All purposes which are charitable according to English law will be charitable under Hindu Law. But, in addition, under the head of advancement of religion, there are other charitable objects in Hidu law which will not be charitable according to English law; for that law forbids bequests for superstitious uses, a restriction which does not apply to grants of this character in India, even in the Presidency towns, and such grants have been repeatedly enforced by the Privy Council. What are religious purposes and what religious purposes will be charitable must of course be entirely decided according to Hindu law and Hindu notions."

In our judgment therefore the word "charities" is an appropriate generic term of wide scope and meaning apt to include all public, secular, charitable and religious trusts and institutions recognised as such by British Indian law, and a power to legislate in respect of "charities" will include a power to legislate in respect of all matters connected with religious charities and institutions. For the reasons indicated earlier the reference to "religious" endowments will not therefore in this context cut down the wide scope of the power of legislation conferred by the opening word of the entry any more than the addition of the words charitable institutions and charitable endowments.

Moreover, if the appellants' arguments were sound that the only powers to be found in the Constitution Act of 1935 to legislate in respect of religious institutions are limited to legislation in respect of religious associations and societies in Entry No. 33 of List II, and religious endowments in Entry No. 34 of the same List, and that Entry No. 9 in List III is not applicable to legislation in respect of religious institutions, then both Central and Provincial Legislatures are without any general powers of legislation in respect of religious institutions, religious trusts and other religious matters. Any legislation in respect of such omitted subjects would have to be authorised by section 104 of the Government of India Act, 1935, or made the subject of an amending Act of Parliament. We find it difficult to believe that such could have been the intention of Parliament, particularly when the references to religious societies and associations in Entry No. 33 and to religious endowments in Entry No. 34 show that legislation in respect of religious matters must have been considered. We cannot believe that such a far-reaching curtailment of legislative powers would have been made in a sphere of legislation of such importance to British India by mere silent omission. Rather we should have expected, if such had been the intention of Parliament, to have found some express prohibition or curtailment of legislation on these subjects, such as is to be found in section 108 of the Act. We should moreover in any event prefer a construction which would enable legislation on a subject of such vital importance in India to be enacted by some legislative body rather than leave it to be dealt with under section 104. The presence in the Government of India Act, 1935, of section 104 makes it impossible to apply directly to the provisions of that Act principles which have been applied in the construction of the British North America Act, as in the *British Coal Corporation* v. *The King*[1], a case pressed upon us by counsel for the respondents. In the Canadian Constitution Act, there is no provision in respect of omitted subjects of legislation. Every subject must be held to be either within the legislative powers of the Dominion Parliament or of the Provincial Legislatures. In the Indian Constitution Act, section 104 has been inserted for the very purpose of enabling legislation to be enacted in respect of subjects omitted from the three Lists in the Seventh Schedule. There is not therefore the same necessity for Courts in India to find that a subject must be comprised within the entries in the Lists. But when there is a choice between two possible constructions of an entry or entries, one of which will result in legislative power being conferred by some entry or entries in the Lists and the other in a finding of no existing power, but if legislation is required that recourse must be had to section 104, the first construction should on principles analogous to those applied to the Canadian Constitution be preferred. *A fortiori* such a

1. (1935) A.C. 511.

construction should be preferred where it can be deduced from some entry or entries in the Lists or some provision elsewhere in the Act that at the time of the compilation of these Lists and the enactment of the Act the subject of legislation was considered and no express prohibition or curtailment of power of legislation on the subject is to be found in the Act. Lastly, such a construction should be preferred where there is actual legislation on the subject, in which case the Court will incline to a construction which will give validity to such legislation. On this point we would refer to and adopt the opinion of the majority of the Judges in this Court in the passage at page 330, In re *Levy of Estate Duty*[1].

In our judgment therefore the Madras Provincial Legislature had power by virtue of Entry No. 34 in List II to legislate in respect of religious institutions within the Province of Madras in the manner in which it purported to legislate by the Act in question in this case. It was argued that the fact that the legislation would affect rights claimed by Hindus domiciled outside the province of Madras would also make the Act *ultra vires*. There is nothing in this point. Any rights affected are rights in respect of the temple at Madura which can only be exercised within the boundaries of the Province of Madras.

It was also argued that section 298 of the Constitution Act prohibited any such legislation as that contained in the provisions of the Act in question. Even if we were prepared to agree with counsel for the appellants that any rights of his clients which have been affected by the legislation in question were "property" within the meaning of that word in the section—to which we certainly are not prepared to commit ourselves—it is impossible to make good the argument that the section applies. It is clear that the challenged legislation does not amount to a prohibition of the holding by his clients of such property on grounds only of religion. If sub-section (1) does not apply, sub-section (2) cannot apply. The suggestion that sub-section (2), though framed as a proviso to sub-section (1), amounted to a separate and general protection in all circumstances of all existing rights attached to members of a community by virtue of some personal law or customs having the force of law is ill-founded.

In our judgment therefore the Madras Temple Entry Authorization and Indemnity Act, 1939, was validly enacted by the Madras Provincial Legislature, having regard to the powers of legislation conferred on Provincial Legislatures by the Government of India Act, 1935, and in particular by Entry No. 34 of List II in the Seventh Schedule.

It accordingly becomes unnecessary to express our views on the question whether the legislation could also have been justified under Entry No. 9 of List III.

The appeal fails and must be dismissed. The appellants must pay to the respondents their costs of this appeal to be taxed.

G.R./V.S. *Appeal dismissed.*

[THE FEDERAL COURT OF INDIA.]

[On appeal from the High Court of Judicature at Lahore.]

PRESENT :—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLAH KHAN, JJ.

Mohammad Mohy-ud-din .. *Appellant**

v.

The King-Emperor .. *Respondent.*

Indian Army Act (VIII of 1911), *section* 41 *and Government of India Act of* 1833, *section* 73—*Section* 41 *of the Army Act if valid and* intra vires *the Indian Legislature—Competency to legislate with extra-territorial effect—Construction of statutes—Scope of the presumption against construing general words as intended to have extra-territorial effect.*

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1. (1944) F.L.J. 215 : (1944) 2 M.L.J. 234 : (1944) F.C.R. 317.

* Criminal Appeal No. 1 of 1946. 9th May, 1946.

The Ruler of an Indian State became an Indian Commissioned Officer in the Indian Army. As he was suspected of having committed offences under sections 121 and 302, Indian Penal Code, he was kept in military custody according to the usage of the service, pending investigation of those offences. He was subsequently arraigned before a Court-martial on those charges. During the pendency of the Court-martial proceedings an application under section 491, Criminal Procedure Code, was filed and in support of it, it was contended that the officer not being a British subject was not amenable to the criminal laws of British India for offences alleged to have been committed outside British India and that so much of section 41 of the Indian Army Act as purported to confer jurisdiction on a Court-martial to try non-British subjects for offences committed by them beyond British India, was *ultra vires* the Indian Legislature.

Held, that portion of section 41 of the Indian Army Act of 1911 as purported to confer such jurisdiction on a Court-martial was *intra vires* the Indian Legislature because section 73 of the Government of India Act, 1833, had conferred on the Indian Legislature the power to legislate with such extra territorial effect. There is no reason or justification for limiting the scope of the very general words "wheresoever they may be found" used in section 73 of the Act of 1833. The words "native officers and soldiers" occurring in section 73 cannot be said to be used in any territorial sense. The expression was merely intended to refer to the non-British or non-European members of the Company's Army. Though it is true that every statute is to be so construed, so far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law, there is no rule of international law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits. In this view, it is very doubtful whether in the present case, there is any presumption necessitating or justifying a limited construction of the general words used in the statute.

Sir Alladi Krishnaswami Ayyar, Senior Advocate, Federal Court (*N. Rajagopala Aiyangar* and *B. Banerji*, Advocates, Federal Court, with him) instructed by *Gobind Saran Singh*, Agent, for Appellant.

Sir Noshirwan Engineer, Advocate-General of India (*Mohammad Sadiq*, Advocate, Federal Court, with him) instructed by *K. Y. Bhandarkar*, Agent, for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal against an order of a Full Bench of the Lahore High Court dismissing an application under section 491 of the Criminal Procedure Code for the release of one Burhan-ud-Din. Burhan-ud-Din is a Member of the ruling family of Chitral, an Indian State adjoining the North-West Frontier Province. The Ruler of Chitral has in recent times been recognised by His Majesty the King Emperor as a Ruler of an Indian State. Burhan-ud-Din is thus admittedly not a British subject; he, however, became an Indian Commissioned Officer in 1936 and was attached to the 2/10 Baluch Regiment of the Indian Army in which he attained the rank of Captain. In September-October, 1945, he was suspected of having committed offences under sections 121 and 302 of the Indian Penal Code; and, pending investigation and disposal of these charges, he was kept in military custody according to the usage of the service. A general Court-martial for the trial of Burhan-ud-Din was constituted in November, 1945, and he was arraigned before the Court-martial in December, 1945, on the charges above referred to. The proceedings before the Court-martial were going on when the application under section 491 of the Criminal Procedure Code was filed before the High Court at Lahore, on December 20, 1945.

The offences charged against Burhan-ud-Din were alleged to have been committed in Rangoon and Singapore. It was submitted in support of the *habeas corpus* application that Burhan-ud-Din who was not a British subject was not amenable to the criminal laws of British India for offences alleged to have been committed outside British India and it was contended that so much of section 41 of the Indian Army Act, 1911, as purported to confer jurisdiction on a Court-martial to try non-British subjects for offences committed by them beyond British India, was *ultra vires* the Indian Legislature. It was accordingly urged that his detention in military custody for the purposes of the said trial was illegal. On behalf of the Crown, it was maintained that section 41 of the Indian Army Act was in its entirety *intra vires* the Indian Legislature and that the detention of Burhan-ud-Din was legal. The High Court accepted this contention of the Crown and dismissed the application. The learned Judges granted a certificate to the effect that the case involved a substantial question of law as to the interpretation of the Government of India Act, 1935, and the Government of India (Adaptation of Indian Laws) Order, 1937, and on the basis of this certificate this appeal has been preferred.

When opening the case, counsel for the appellant conceded that no question as to the interpretation of the Government of India Act, 1935, arose in the case. The plea that section 41 of the Indian Army Act, 1911, was to a certain extent invalid was based on section 22 of the Indian Councils Act, 1861, which, with some amendments made in the years 1865 and 1869, was the law in force at the time the Indian Army Act of 1911 was enacted by the Indian Legislature. The contention of the Crown in support of the validity of section 41 of the Indian Army Act was based on section 73 of the Government of India Act of 1833. It was thus clear that nothing turned on the Government of India Act, 1935. As regards orders in Council under that statute, there was no doubt an alternative contention urged by the Advocate-General before the High Court on the terms of the Adaptation Order of 1937. In the view that the learned Judges took on the main question, it became unnecessary to deal with this alternative argument and two of the Judges accordingly said nothing in their judgments about it. Abdul Rashid, J., over-ruled this contention of the Advocate-General; but, as he too agreed with the view of the other two Judges on the main question, his observations, on the effect of the Adaptation Order must be taken to be *obiter*. Before us, it was not found necessary to urge this contention based on the Adaptation Order. In the absence of any question involving the interpretation of the Government of India Act, 1935, counsel for the appellant could only rely on his petition asking for leave to urge other contentions and, in the circumstances of the case, he was granted leave to argue the point as to the validity of section 41 of the Indian Army Act, 1911.

Two contentions were urged in support of the appeal. It was argued that section 73 of the Government of India Act of 1833 ceased to be in operation after the enactment of the Indian Councils Act of 1861, that the validity of section 41 of the Indian Army Act of 1911 must accordingly be determined with reference to the terms of section 22 of the Indian Councils Act of 1861 (as amended in 1865 and 1869), and that on the true construction of section 22, the Indian Legislature had no power to enact a law prescribing a punishment for any offence committed by a non-British subject outside British India. Alternatively, it was contended that even if the question should be determined with reference to the terms of section 73 of the Government of India Act of 1833, the power of the Indian Legislature thereunder was no wider than under section 22 of the Indian Councils Act of 1861.

It is difficult to follow the contention that section 73 of the Government of India Act of 1833, ceased to be operative after 1861. The Indian Councils Act of 1861 repealed only certain specified sections of the statute of 1833 and the continuance of the remaining provisions of the older statute was placed beyond all doubt by an express provision in the latter part of section 2 to the effect that " all other enactments whatsoever now in force with relation to the Council of the Governor-General of India . . . . . . shall, save so far as the same are altered by or are repugnant to this Act, continue in force and be applicable to the Council of the Governor-General of India . . . . under this Act." Section 73 of the Act of 1833, not being one of the sections specifically repealed, would thus be one of the provisions continuing in operation. This conclusion is confirmed by the express reference to that section in one of the provisos to section 22 of the Act of 1861. While the body of section 22 authorised the Governor-General in Council in general terms " to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of justice whatever and for all places and things whatever within the said territories, etc.," the provisos precluded the Governor-General in Council in the exercise of this general power, from making any laws or regulations " which shall repeal or in any way affect any of the provisions " of various Acts of Parliament. Among the statutes thus placed beyond the power of the Indian Council to affect were parliamentary enactments " for punishing mutiny and desertion in Her Majesty's Army or in Her Majesty's Indian Forces." To this exception, a counter-exception was made in so far as the Governor-General in Council might exercise the powers conferred by section 73 of the Govern-

ment of India Act, 1833. This makes it clear that Parliament, even while enacting the Indian Councils Act of 1861, contemplated the continued exercise by the Indian Council of the powers conferred on it by section 73 of the Act of 1833. It seems to have been contended before the High Court that section 73 of the Act of 1833 was repugnant to section 22 of the Indian Councils Act of 1861 and must, therefore, be deemed to have ceased to be in operation after 1861, at least in respect of the words now relevant, because the concluding words of section 2 of the Indian Councils Act of 1861 saved earlier enactments *only* in so far as they were not repugnant to the Act of 1861. This contention was not pressed before us as it is obviously untenable. Section 22 of the Act of 1861 substantially reproduced section 43 of the Act of 1833 and if both sections 43 and 73 could have subsisted together in the Act of 1833, there was no reason why they should not co-exist after 1861. Section 22 of the Act of 1861 (like section 43 of the Act of 1833) dealt with the general legislative powers of the Governor-General in Council, while section 73 of the Act of 1833 dealt with a special case, namely, laws governing the armed forces of the Indian Government. There is accordingly no basis for the argument of repugnancy. Before us, appellant's counsel put the argument in a somewhat different form. He contended that in the earlier Act, the power conferred by section 73 was only an illustration of the general power of legislation conferred by section 43 and that accordingly any exercise of the power under section 73 was subject to all the limitations affecting the exercise of the general legislative powers imposed by section 43 and that if the power conferred by section 73 continued in force, after 1861, it must similarly be subject to the limitations of section 22 of the Act of 1861, which section had replaced section 43 of the earlier Act. It will be convenient to consider this argument when dealing with the second head of the appellant's contention.

Turning now to the Government of India Act of 1833, it must be noticed that section 73 contained express words connoting a wider territorial operation than that which the words found in section 43 would authorise. Section 43, which conferred the general legislative power, empowered the Governor-General in Council to make "laws and regulations for all persons, whether British or native, foreigners or others . . . . for all places and things whatsoever within and throughout the whole and every part of the said territories". The territorial ambit was thus clearly limited. Some extension was provided by another clause which authorised legislation governing all servants of the Company even "within the dominions of Princes and States in alliance with the Company". Section 73, which authorised the framing of Articles of War "for the government of the native officers and soldiers in the military service of the Company and for the administration of justice by Courts-martial", provided that the Articles so made should have authority "over all the native officers and soldiers in the said military service to whatever Presidency such officers and soldiers may belong or *wheresoever they may be serving*". This provision not only contained no words of territorial limitation, but, by the use of the underlined words "wheresoever they may be serving" clearly indicated an intention to make the Articles binding on the officers and soldiers independently of any territorial limitation. Appellant's counsel rightly placed no reliance on the words "to whatever Presidency such officers and soldiers may belong", because these were not words indicative of a territorial limitation, but were only used in view of the fact that each of the three Presidencies had a separate army at that time. But he contended that as a matter of interpretation the words "wheresoever they may be serving" must be construed as being subject either to the same territorial limitations as is found in section 43 or at least as being limited to India. Assuming that a subordinate legislature cannot validly make laws imposing punishments on non-subjects for offences committed by them outside the territorial limits of its jurisdiction, there can be no doubt that Parliament can, if it so chooses, authorise even a subordinate legislature to legislate with extra-territorial effect. The only question, therefore, is whether, according to the plain meaning of the words used in section 73, such power was conferred on the Indian Legislature.

It was contended that there was a presumption against construing even general words in an Act of Parliament as intended to have extra-territorial effect or authorise extra-territorial legislation. The passages relied on in this connection from Maxwell's Interpretation of Statutes do not go the length necessary for the appellant's case. It is true that every statute is to be so interpreted, so far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law (Maxwell, on the Interpretation of Statutes, 8th edn., p. 130). Whatever may be the rule of international law as regards the ordinary citizen, we have not been referred to any rule of international law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits. Indeed, there may be greater reason for recognising such power when the army is operating in enemy country than when it is within its own country. In this view, it is very doubtful whether in a case like the present, there is any presumption necessitating or justifying a limited construction of the general words used in the statute. Further, it is recognised that the presumption, if any, will give way whenever the intention of Parliament is clear or the nature of the subject-matter or the history of the legislation relating to it justifies the assumption of extra-territorial jurisdiction. Our attention has been drawn to several Mutiny Acts passed in England from time to time since the closing years of the 18th century. They make it clear that Parliament intended to make the Acts as well as Articles of War framed by the King binding on the soldiers and officers of the English Army even when they were serving outside the British Dominions. With reference to the East India Company's army also, Parliament had passed Mutiny Acts from time to time, beginning from 1754. It would also appear that the Governors and the Governors-General in India had framed Articles of War for the discipline of the native troops maintained by the Company. The Charter Act of 1813 validated (by section 97) the Articles of War theretofore framed in India and (by section 96) empowered the Governments in India to make "laws and regulations and Articles of War for the order and discipline of all officers and soldiers, natives of the East Indies or other places within the limits of the said Company's Charter in their respective services, etc." This section contains no words signifying either a limited or an extended territorial operation. Counsel for the appellant contended that as the power under this section is described to be "as full and ample" as the power possessed by the Governments in India to "make any other laws or regulations for the Government of the natives of the several territories subject to the said Presidencies", the section must be construed as subject to the same territorial limitation as the general legislative power. Even if this argument should be held to have any force, it would have no application to the Act of 1833, because, as already stated, the language of section 73 of that Act is clearly different from the language of section 43 (referring to the general legislative power).

In interpreting section 73 of the Act of 1833, it may be useful to bear in mind the provisions of an Act passed by Parliament in 1823 (4 Geo. IV, C. 81) entitled "An Act to consolidate and amend the laws for punishing mutiny and desertion of officers and soldiers in the service of the East India Company". Section 62 of this Act saved all matters "enacted or declared respecting officers or soldiers being natives of the East Indies or other places within the limits of the said Company's Charter" contained in the Charter Act of 1813, and section 63 enacted "that whenever any portion of such native troops shall be serving in any country or place out of the possessions or territories which are or may be under the Government of the said United Company, whether such be the Dominions of His Majesty or elsewhere, on the trial of all offences committed by any native officer or soldier or follower, reference shall be had to the Articles of War framed by the Government of the Presidency to which such native officer, soldier, or follower shall belong". It seems to us reasonably clear that it was the sense of the words "serving in any country or place out of the possessions or territories under the Government of the

said United Company, etc.," in section 63 of this statute that was sought to be reproduced by the words "wheresoever they may be serving" in section 73 of the statute of 1833. That Parliament contemplated the punishment of officers and soldiers of the Indian Army even in respect of offences committed outside the territories under the Government of the East India Company is made clear by section 2 of 7 and 8 Vict., C. 18. We thus see no reason or justification for limiting the scope of the very general words "wheresoever they may be serving" used in section 73 of the Act of 1833.

Another argument in support of giving the section a limited operation was based on the use of the words "native officers and soldiers" in section 73. It was contended that Burhan-ud-Din was not a "native" officer within the meaning of the section. The High Court held that the word "native" was here used in contradistinction to British (or European) as both sets of people were employed in the Company's army. Alternatively, they held that the word "native" in this section had the same meaning as the expression "natives of the East Indies or of other territories within the limits of the Company's Charter" found in other parliamentary enactments relating to the Indian Army. Both these interpretations would bring Burhan-ud-Din within the operation of the section. Counsel for the appellant took strong exception to the view that the word "native" was used in a racial sense and he insisted that it must have been used in a territorial sense and as the descriptive words "of the East Indies and of other territories within the limits of the Company's Charter" found in the Charter Act of 1813 had not been repeated in section 73 of the Act of 1833, he argued that it was reasonable to infer that the word "native" referred either to the natives of the Company's possessions or at best to the natives of India. This view would, according to him, exclude persons in the position of Burhan-ud-Din, because he was not a native, either of British India or of India (taking Chitral not to have been a part of India in 1833). We are not able to accede to this contention.

It cannot be denied that in more than one parliamentry statute the words "native" and "British" were used as antithetical terms. Section 43 of the Government of India Act of 1833 referred to laws and regulations to be made "for all persons, whether British or native, foreigners or others". S. 22 of the Indian Councils Act of 1861 repeated the same language. In the Charter Act of 1813, section 55, in providing for the payment of the charges and expenses of raising and maintaining the forces of the East India Company, spoke of "the forces as well European as native". The scheme of the parliamentary enactments relating to the Indian Army shows that a distinction has always been maintained between the British element in those forces and the non-British element, in respect of the Articles of War by which they were to be generally governed. S. 1 of 7 & 8, Vict., C. 18, in referring to the officers and soldiers in the service of the East India Company, grouped them as (*i*) officers, soldiers and so forth, *not* being natives of the East Indies or other places within the limits of the Company's Charter, and (*ii*) officers, soldiers and so forth, being natives of the East Indies or other places within the limits of the Company's Charter. It, therefore, seems to us not unreasonable to hold that the expression "native officers and soldiers" in section 73 was intended to refer to the non-British or non-European members of the Company's army. Even if it should be held that the word "native" must be understood as having a territorial significance, that is, as meaning the native of some place or country, it seems to us that the territory contemplated when using the word "native" must have been the same as was connoted by the words "natives of the East Indies or other places within the limits of the Company's Charter". If a limitation as to the locality is to be suggested at all, it may with some show of reason be argued that the word "native" can refer only to natives of the territories under the administration of the Company but counsel for the appellant obviously felt that this would be too restricted an interpretation to suggest, because it was impossible to maintain that the Company's non-European soldiers were recruited only from the areas within the Company's Government. If such a limitation based on the territorial

limits of the authority of the Company is ignored, no particular reason has been suggested why India as a mere geographical unit should have been the territory intended. On the other hand, the Advocate-General pointed out that in later enactments of Parliament, it had been clearly assumed that the Governor-General in Council had authority to frame Articles of War in respect of such officers and soldiers of the Company's army as could be comprehended in the description "natives of the East Indies or other territories within the limits of the Company's Charter" (*Cf.* the concluding words of section 7 of 3 and 4 Vict., C. 37); and as this power of the Governor-General in Council could be traced only to section 73 of the Government of India Act of 1833, he argued that the assumption made by Parliament in the later Act might legitimately be used as an aid in interpreting the general or ambiguous language of the earlier Act. In support of this contention, he relied on the observations in Maxwell, on the Interpretation of Statutes (8th Edn., pp. 32 and 33), the observations of Lord Buckmaster in *Ormond Investment Co.* v. *Betts*[1], and certain observations in *Admiralty Commissioners* v. *Valverda*[2]. There are one or two other statutory provisions which seem to us to give a clear indication that the word "native," when used as an adjective in similar statutes, was used in the same sense as the wider expression "natives of India and other territories included in the Company's Charter," it having been found convenient to add these extra words whenever the word "native" was used in the noun form. In 3 and 4 Vict., C. 37, section 7 referred to Articles of War enacted by the Government of India "respecting officers or soldiers being natives of the East Indies or other places within the limits of the Company's Charter." In the very next section, the same class of persons was described by the words "any native officer or soldier." In 4 Geo. IV, C. 81, we find in one and the same section (section 62) reference in the earlier portion to officers or soldiers being natives of the East Indies or other places within the limits of the Company's Charter and at the end of the same section these persons are referred to as "such native officers and soldiers." Both kinds of description are also found in the concluding portion of section 1 of 12 and 13 Vict., C. 43. The conclusion that the expression "native officers and soldiers" had no different significance from the words "officers and soldiers being natives of the East Indies or other places within the limits of the Company's Charter" is also more consonant to reason than the limited construction suggested on behalf of the appellant, because no reason has been or can be suggested for making a distinction between native officers and soldiers recruited from India and native officers and soldiers recruited outside India, in respect of the application of Articles of War to them, so long as both sets of people were serving in the Indian Army.

We are accordingly of the opinion that the impugned portion of section 41 of the Indian Army Act, 1911, was *intra vires* the Indian Legislature. The appeal fails and is dismissed.

G.R./V.S. ——— *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the Federal Court of India.)*

PRESENT :—LORD MACMILLAN, LORD WRIGHT, LORD DU PARCQ, LORD JUSTICE MORTON AND SIR JOHN BEAUMONT.

Thakur Jagannath Baksh Singh .. *Appellant*†

v.

The United Provinces .. *Respondent.*

U. P. Tenancy Act (*XVII of* 1939)—*The Government of India Act* (1935), *sections* 299 *and* 300 (1) *and Schedule VII, List II, item* 21—*Validity of the Provincial legislation—Competency of Court to annul legislation within the sovereign competence of the Legislature—Crown grant—Derogation from the terms of—Legislature's competency—Sections* 299 *and* 300 (1) *if a prohibition to the impugned legislation—Crown Grants Act* (*XV of*

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1. (1928) A.C. 143 at 156. 2. (1938) A.C. 173.

* (1943) 2 M.L.J. 114 : 6 F.L.J. 55.

† P. C. Appeal No. 70 of 1944. 1st May, 1946.

1895), *section* 3—*Construction*—*If limits the statutory competence of the Provincial Legislature under the constitution Act.*

The question was whether the U. P. Tenancy Act, 1939, is *ultra vires* of the Provincial Legislature either in its entirety or as regards certain provisions. It was claimed that the Act created rights and interests in land in favour of persons other than the grantee contrary to the Sanad granted by the Crown and thus derogates from the terms of the Crown grant, because it modifies or curtails the rights conferred by the Crown.

Held; the claim put forward is that the Court should declare *ultra vires* and void an Act of a sovereign parliament such as that of Oudh. Under the Government of India Act, 1935, the Provincial Legislatures (including that of the U. P.) are given exclusive power to make laws for the Province or any part thereof with respect to the matters enumerated in List II in the 7th schedule. The enumeration contained in item 21 of that list covers all subjects dealt with in the impugned Act. That Act was therefore within the express powers of the Legislature which passed it. No Court can annul the enactment of a legislative body acting within the legitimate scope of its sovereign competence. If the subject-matter of the Crown grant is within the competence of a Provincial Legislature nothing can prevent that Legislature from legislating about it unless the Constitution Act itself expressly prohibits legislation on the subject either absolutely or conditionally. The Crown cannot deprive itself of its legislative authority by the mere fact that in the exercise of its prerogative it makes a grant of land within the territory over which such legislative authority exists. The prohibition contained in section 299 of the Constitution Act does not affect the present case as it is not a confiscatory legislation. To regulate the relations between the landlord and tenant and thereby diminish rights, hitherto exercised by the landlord in connection with his land, is different from compulsory acquisition of the land. The questions involved here are questions of legislative competence and not merely of delay or precautionary safeguards. Nor does sub-section (1) of section 300 of the Constitution Act contain any prohibition against such legislation, because the sub-section is only dealing with executive action, whereas here it is not executive authority which is in question but legislative competence and authority and legislative action.

Held, further, that the general words of section 3 of the Crown Grants Act, 1895, cannot be read in their apparent generality. The whole Act was intended to settle doubts which had arisen as to the effect of the Transfer of Property Act, 1882, and must be read with reference to the general context and could not be construed to extend to the relations between a Sanad holder and his tenants. Still less could they be construed to limit the statutory competence of the Provincial Legislature under the Constitution Act.

Quaere (1) whether a suit lies under section 42, Specific Relief Act, for a declaration that a Provincial Statute is *ultra vires* and (2) whether an appeal will lie to the Federal Court from a judgment of a single judge of a High Court when the judgment is appealable to a Division Bench of the same High Court.

C. S. Rewcastle, K.C. and *S. P. Khambatta* for Appellant

J. Millard Tucker, K.C. and *W. Wallach* for Respondent.

Their Lordships' Judgment was delivered by

LORD WRIGHT.—The appellant, who is the taluqdar of Bhawanshahpur, brought his action in the Court of the Civil Judge, Sultanpur, Oudh, claiming a declaration that the United Provinces Tenancy Act, 1939, is either *ultra vires* or not *intra vires* of the Provincial Legislature, either in its entirety or at least as regards the provisions, about 42 in number, scheduled to the complaint. His claim failed before the Judge; he then appealed to the Federal Court of India, which dismissed the appeal but granted leave to appeal to this Board.[1]

The appellant is the direct descendant of Babu Sitla Baksh Singh, who was grantee of a Sanad from the Governor-General after the Indian Mutiny of 1857. By this Sanad the Crown granted to the appellant's predecessor in title the full proprietary rights, the permanent heritable and transferable rights in the ancestral estate which were confirmed by the Oudh Estates Act (No. I of 1869). That Act contains entries of the name of the appellant's predecessor in lists I and II of the lists prepared under section 8 of the Act, the numbers of the entries being No. 241 and No. 108. List No. 1 contains a list of all persons who are to be considered taluqdars within the meaning of the Act. The position of the taluqdar is defined by section 3 of the Act to be that he should be deemed to have thereby acquired a permanent heritable and transferable right in the estate specified. The grant of the estate was under section 3 to be subject to all the conditions affecting the taluqdar contained in the orders passed by the Governor-

1. (1943) 2 M.L.J. 114 : 6 F.L.J. 55.

General of India on the 10th and 19th days of October, 1859, and republished in the first Schedule annexed to the Act and subject also to all the conditions contained in the Sanad under which the estate was held. These letters are set out in full in Chhail Bihari Lal's book on the taluqdari law of Oudh at p. 387 *seq.* It is enough here to quote the passage in the letter of the 19th October, 1859, which is specially relevant to the questions involved in this case. This passage, which is set out in the judgment of Gwyer, C. J., in the present appeal in the Federal Court, runs thus :—

"The Sanads declare that while, on the one hand, the Government has conferred on the taluqdars and on their heirs for ever the full proprietary right in their respective estates, subject only to the payment of the annual revenue that may be imposed from time to time, and to certain conditions of loyalty and good service, on the other hand, all persons holding an interest in the land under the taluqdars will be secured in the possession of the subordinate rights, which they have heretofore enjoyed. The meaning of this is that, when a regular settlement of the Province is made, wherever it is found that Zamindars or other persons have held an interest in the soil intermediate between the raiyat and the taluqdar, the amount or proportion payable by the intermediate holder to the taluqdar and the net jama finally payable by the taluqdar to the Government, will be fixed and recorded after careful and detailed survey and inquiry into each case, and will remain unchanged during the currency of the settlement, the taluqdar being, of course, free to improve his income and the value of his property by the reclamation of waste lands (unless in cases where usage has given the liberty of reclamation to the zamindar), and by other measures of which he will receive the full benefit at the end of the settlement. Where leases (pattas) are given to the subordinate zamindars, they will be given by the taluqdar, not by the Government. This being the position in which the taluqdars will be placed, they cannot, with any show of reason, complain if the Government takes effectual steps to re-establish and maintain in subordination to them the former rights, as those existed in 1855, of other persons whose connection with the soil is in many cases more intimate and more ancient than theirs ; and it is obvious that the only effectual protection, which the Government can extend to these inferior holders, is to define and record their rights, and to limit the demand of the taluqdar as against such person during the currency of the settlement to the amount fixed by the Government as the basis of its own revenue demand."

The original Sanad granted to the appellant's predecessor conferred the full proprietary right, title and possession of the estate specified in the Kuboolyut, on the grantee and his heirs for ever, subject to the payment of such annual revenue as might from time to time be imposed and to certain conditions as to loyalty to the Crown. There was also a further condition that the grantee would so far as is in his power promote the agricultural prosperity of the estate and that all persons holding under him should be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations were observed by the grantee and his heirs in good faith so long would the British Government maintain the grantee and his heirs in their position as proprietors of the estate. The Sanad was signed and sealed by George Udney Yule, Officiating Chief Commissioner of Oudh.

It is not here necessary to trace in any detail the history of the land settlement in Oudh which found its culmination in the measures referred to above. That history has been most completely and accurately expounded in the judgment of Gwyer, C.J., in the Federal Court in this case, which will rank as the classic exposition of this important topic. It is enough to extract from the judgment a single passage :

"From these documents [namely, certain despatches and a letter which the Chief Justice refers to] which are all on record and which we have not therefore thought it necessary to set out in full, it appears that Lord Canning's first and main preoccupation was to secure the pacification of the Province as speedily as possible ; and this he did not feel able to do so long as the taluqdars and other landholders continued to be bitterly opposed to him. He was not disposed to take too harsh a view of their attitude during the Mutiny, since they had become subjects of the Crown only a few months before it broke out and by the introduction of British rule many 'had suffered a loss of property and all had experienced a diminution of the importance and arbitrary power that they had hitherto enjoyed.' He was disappointed that the proprietary village communities and the village zamindars had not taken the side of the Government during the Mutiny in spite of the policy which had instigated the first summary settlement in 1856. He had also begun to feel doubts about the views held by Lord Dalhousie's Government on the subject of land tenures in Oudh : and he recognised that many real injustices had been committed in the course of the settlement, which were calculated to alienate the taluqdars still further. Lastly, he had the predilection of an English nobleman of his generation for a territorial aristocracy of great families, who subject to safeguards and restrictions which had been absent during the time of the nawabi, would form a stable and conservative element in

a Province henceforward at peace. The confiscation Proclamation was therefore only a means to an end. It gave the Government a *tabula rasa* for the initiation of a new land policy. It enabled them to restore dispossessed proprietors and thus enlist their sympathy and support, but also to remove some of the more glaring evils of the former system. It enabled them to establish the taluqdars as a powerful territorial aristocracy, but at the same time to recognise rights formerly enjoyed by under-proprietors. It was in other words an important part of Lord Canning's policy of pacification; and if the strict legal rights of individuals had to yield in some measure to more practical considerations of administrative convenience and expediency, there can be no doubt that the immediate effect was to bring peace and order to a distracted Province. And it may well be that even those who suffered diminution in their legal rights have benefited in the long run by the restoration of the rule of law and a more settled system of Government."

This being the general nature of the settlement embodied in the Sanads and in the Oudh Estates Act, 1869, it is now necessary to explain how the present dispute has arisen. In 1939 there was enacted the United Provinces Tenancy Act, 1939. The preamble states:

"Whereas it is expedient to consolidate and amend the law relating to agricultural tenancies and other matters connected therewith in Agra and Oudh, it is hereby enacted as follows."

The Act is an elaborate measure consisting of 296 sections. Its general scope is sufficiently clear from the short title and preamble. It regulates and secures the rights of the tenants in various respects on lines sufficiently familiar in modern agricultural legislation. It is not contested that in doing so, it impinges on the powers which, but for such a measure, the taluqdars might have exercised within their estates. What is claimed by the appellant is that the Act creates rights and interests in land in favour of other persons contrary to the Sanad granted to the appellant (or his predecessor) by the Crown and thus derogates from the terms of the Crown grant, because it modifies or curtails the rights conferred by the Crown. It is not necessary to examine in detail the particulars set out in the Plaint, and it has been conceded on behalf of the respondent that "some of the provisions of the Act do undoubtedly cut down the absolute rights claimed by the taluqdars to be comprised in the grant of their estates as evidenced by Sanads such as we have set out above." Their Lordships take the terms of this concession from the statement of its scope made by the Judges of the Federal Court and repeated before their Lordships. That relieves their Lordships from a precise consideration of what may have been the exact qualification of the taluqdars' rights embodied in the words of the Sanad quoted above which aims at the protection of subordinate holders of the land. It is enough for present purposes to observe that some infringement of the rights of taluqdars under the Sanad was in any event effected by the Act.

It is however clear that the claim put forward on behalf of the appellant is that the Court should declare *ultra vires* and void an Act of a sovereign parliament such as that of Oudh. Under the Government of India Act, 1935, the Provincial Legislatures (including that of the United Provinces) are given exclusive power to make laws for the province or any part thereof with respect to the matters enumerated in List II in the 7th schedule (section 100 of the Act). Item 21 of List II enumerates as matters within the exclusive competence of the Provincial Legislature:

"21. Land, that is to say rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of wards; encumbered and attached estates; treasure trove."

This enumeration covers all the subjects dealt with in the Act of 1939. That Act was therefore within the express powers of the Legislature which passed it. "It must always be remembered," said Gwyer, C.J., in *United Provinces* v. *Musammat Atiqa Begum*[1] "that within their own sphere the powers of the Indian Legislatures are as large and ample as those of Parliament itself." It is many centuries since the Courts were invited to hold that an Act of Parliament was *ultra vires* or invalid in law on the ground that it infringed the prerogative of the Crown. So startling a claim as that made in the present case cannot be upheld. That broad and

1. (1940) 3 F.L.J. 97 at 115. (1941) 1 M.L.J. (Supp.) 65.

general principle is sufficient to dispose of the claim. No Court can annul the enactment of a legislative body acting within the legitimate scope of its sovereign competence.

It is, however, desirable to examine the particular grounds on which it is sought to induce the Court to arrive at this paradoxical conclusion. Some of these are said to be based on the general principle of law that the Crown cannot derogate from its own grant, others are said to depend on particular provisions of the Government of India Act.

It has not been possible for the appellant to adduce any authority for the principle involved, which their Lordships apprehend to be that Parliament, whether Imperial, Federal or Provincial, in the absence of express prohibition, is debarred from legislating so as to vary the effect of a Crown grant. The appellant relies on certain express provisions of the Government of India Act. Thus he relies on section 299 of the Act, which provides that no person shall be deprived of his property in British India save by authority of law, and that neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition of land for public purposes save on the basis of providing for the payment of compensation. But in the present case there is no question of confiscatory legislation. To regulate the relations of landlord and tenant and thereby diminish rights, hitherto exercised by the landlord in connection with his land, is different from compulsory acquisition of the land. As to sub-section 3 of section 299 it was rightly decided by the Chief Court that the provisions of the sub-section did not apply. That ruling was not questioned before or dealt with by the Federal Court. Furthermore, in the view of that Court the questions involved in the whole appeal were questions of legislative competence not merely of delay or precautionary safeguards. Their Lordships agree with that view. They completely concur in the opinion of the Federal Court that "if once it be found that the subject-matter of a Crown grant is within the competence of a Provincial Legislature nothing can prevent that Legislature from legislating about it unless the Constitution Act itself expressly prohibits legislation on the subject either absolutely or conditionally." The appellant finally contended on this point that a sufficient prohibition is found in section 300 (1) which provides that the executive authority of the Federation or a Province shall not be exercised save on an order of the Governor-General or Governor as the case may be, in the exercise of his individual judgment, so as to derogate from any grant or confirmation of title of or to land. It is, however, clear on the face of this sub-section that it is only dealing with executive action, whereas here it is not executive authority which is in question but legislative competence and authority and legislative action. These different categories, namely, executive order as distinguished from legislative enactment, are so completely disparate and dissimilar that it does not seem necessary to say any more on the point. Their Lordships are content simply to express their agreement with the Chief Court and the Federal Court in rejecting the contention as irrelevant. Section 50 (3) was also referred to in the course of the proceedings. But it is even more clearly irrelevant than section 300.

Support may be found (if support is needed) for the general proposition that the Crown cannot deprive itself of its legislative authority by the mere fact, that in the exercise of its prerogative it makes a grant of land within the territory over which such legislative authority exists. So the proposition is stated by Luxmoore, J., in *North Charterland Exploration Co.* v. *The King*[1]. In that case the Crown which made the grant was also the supreme legislative authority in the Protectorate, but the two powers were separate and distinguishable. Luxmoore, J., at p. 186, observed:

"the doctrine of derogation from grant cannot be applied in the case of a grant by the Crown so as to deprive it of its paramount right [*i.e.*, as the legislative authority] to legislate for the Protectorate in which the subject of the grant is situate. To do so would be to place the Crown with reference

1. (1931) 1 Ch. 169 at p. 187.

to any land granted by it in an inferior position to that occupied by other owners of land within the same Protectorate."

No principle relevant to this case can be extracted from *Burrard Power Company, Ltd.* v. *The King*[1], where it was held that the legislative competence there in question belonged to the Dominion of Canada, not to the Province of British Columbia.

Their Lordships ought to refer in passing to the Crown Grants Act, 1895, of which section 3 was relied on by the appellant. That section runs :

"All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid [*i.e.*, one made by the Crown] shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."

These general words cannot be read in their apparent generality. The whole Act was intended to settle doubts which had arisen as to the effect of the Transfer of Property Act, 1882, and must be read with reference to the general context and could not be construed to extend to the relations between a Sanad holder and his tenants. Still less could they be construed to limit the statutory competence of the Provincial Legislature under the Constitution Act.

In conclusion their Lordships desire to quote with approval the language in which the Federal Court sums up its view of the whole position :

"We desire however to point out that what they are now claiming is that no Legislature in India has any right to alter the arrangements embodied in their sanads nearly a century ago ; and, for all we know, they would deny the right of Parliament itself to do so. We hope that no responsible Legislature or Government would ever treat as of no account solemn pledges given by their predecessors ; but the readjustment of rights and duties is an inevitable process, and one of the functions of the Legislature in a Modern State is to effect that re-adjustment where circumstances have made it necessary, with justice to all concerned. It is however not for this Court to pronounce upon the wisdom or the justice, in the broader sense, of legislative acts ; it can only say whether they were validly enacted, and in the present case we are satisfied that neither the United Provinces Tenancy Act, 1939, as a whole, nor any of those provisions of it which are set out in the schedule to the plaint, are open to challenge on any of the grounds which have been argued before us."

Their Lordships will humbly advise His Majesty that in their opinion the appeal should be dismissed.

The appellant will pay the costs of the appeal.

In dismissing the appeal their Lordships wish to make it clear that they express no opinion on two points mentioned in the case but not argued before their Lordships because neither party desired to raise them. Both parties in this appeal wished to have a decision on the merits. The points are (1) whether a suit lies under section 42 of the Specific Relief Act for a declaration that a provincial statute is *ultra vires*, and (2) whether an appeal will lie from the judgment of a single judge of a High Court when the judgment is appealable to a Division Bench of the same High Court. In the circumstances of the particular case, their Lordships feel it is permissible to pass over these possible contentions without further comment, but their silence in that regard must not be taken to indicate that they have tacitly accepted either of them.

Solicitors for Appellant : *T. L. Wilson & Co.*

Solicitor for Respondent : *Solicitor, India Office.*

Appeal dismissed.

H.J.U./V.S.

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1. (1911) A.C. 87.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA AND MR. JUSTICE YAHYA ALI.

Nachappa Goundan .. *Appellant**

v.

Samiappa Goundan and another .. *Respondents.*

Transfer of Property Act (IV of 1882, before its amendment in 1929), sections 61, 92 and 52—Mortgage—Puisne mortgagee purchasing an item of mortgaged property and discharging out of consideration earlier mortgages—Subsequent suit for redemption by purchaser in execution of decree on a subsequent mortgage—Right of subrogation and consolidation—Purchase during pendency of suit on subsequent mortgage—Effect—Section 61—Amendment of 1929—If retrospective.

On 21st June, 1916, *K* executed a usufructuary mortgage to *S* for Rs. 2,000 of items 1 to 3 and another land. On the 13th June, 1917, a second mortgage was executed for Rs. 2,000 in favour of *R* and *T*. On the 29th August, 1918, there was a third mortgage for Rs. 1,000 in favour of *T*. A fourth mortgage for Rs. 1,000 in favour of *X* was executed on the 21st March, 1921, and a fifth mortgage for Rs. 2,200 was executed on 15th April, 1921, in favour of *C* who assigned it to *Y*. In execution of the decree in the suit on the fourth mortgage impleading *C*, the fifth mortgagee, the properties were sold on 29th March, 1927, for Rs. 2,100. On 6th April, 1927, a suit on the fifth mortgage was filed by *Y*, the assignee from *C*. On the 21st April, 1927, item I was sold to *R's* son *N* for Rs. 10,000 which was left with the vendee, for the purpose of paying the first, second and third mortgages and for payment under Order 21, rule 89 of the Code of Civil Procedure to set aside the sale in execution of the decree on the fourth mortgage. The sale deed declared that there was no other encumbrance and included a covenant that if there should be any other encumbrances the vendor should discharge the same from and out of his other properties. The sale was subsequent to the date of the plaint in the fifth mortgagee's suit. The fifth mortgagee's suit ended in a decree and *S* became the purchaser in execution. *S* obtained only symbolical possession as he could not obtain actual possession and commenced a suit for possession of the property. Meanwhile *N* paid the amount under Order 21, rule 89, Civil Procedure Code and the sale in execution of the decree on the fourth mortgage was set aside on 6th June, 1927. *T* assigned his half share in the second mortgage and the whole of his interest in the third mortgage in favour of *R* and another *M*. *R's* son *N* paid the amount due to *M*. On 19th May, 1929, the amount due under the first mortgage was paid by *N* and he got into possession of the properties. *N* claimed that he should be paid the entire sum of Rs. 10,000 (paid towards the first four mortgages) before he can be compelled to give up possession to *S*. The suit was amended as one for redemption.

Held, (i) *N* is entitled to be paid the entire sum of Rs. 10,000 before he is compelled to give up possession. It cannot be urged that if there was a personal covenant by the vendor to pay the later encumbrance sought to be enforced the rule of subrogation would be avoided. The stipulation that the sale was to be free from all mortgages is a sufficient indication that there was an implied agreement that the prior mortgages were to be kept alive for the benefit of the later alienee. The fact that *N's* purchase became unavailable by virtue of section 52 of the Transfer of Property Act as against the person who filed his suit prior to the sale is not a ground for excluding the right of subrogation.

Limitations to the rule that *covenant excludes subrogation* discussed.

(ii) The right of consolidation claimed is not a mere right to take advantage of an existing statute when it was repealed but is an accrued right. The moment that one mortgagee gets in the right of other mortgagees or charge-holders, the right of consolidation arises and is a valuable vested right in property and the amended section 61 of the Transfer of Property Act has no retrospective effect on such rights.

(iii) Subrogation is tantamount to an assignment in law and it will be fallacious to say that a subrogee cannot acquire a right of consolidation.

(iv) As consolidation arises by the fact that several encumbrances became united in one person, on the date when they so became united in one and the same person they must all have been alive; but if a mortgagee has a right to insist upon redemption of all the mortgages which have become united in him, he can hold on to the property and claim that the mortgagor when redeeming the one, must redeem all; and in such a case, there is no necessity for all the mortgages being alive on the date of the suit.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore (Principal Judge) in A.S. No. 4 of 1944 preferred against the decree of the District Munsiff of Dharapuram in O.S. No. 104 of 1941.

K. Bashyam and *R. Desikan* for Appellant.

K. V. Krishnaswami Aiyar, *P. N. Appuswami Aiyar* and *Mandalam Venkataramana Aiyar* for Respondents.

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* S. A. No. 1005 of 1944. 4th January, 1946.

The Judgment of the Court was delivered by

Somayya, J.—This second appeal raises several interesting questions relating to the law of subrogation and consolidation. The first defendant in the action is the appellant before us. The suit started as one for possession of the plaint mentioned property. The plaintiffs-respondents purchased the property in execution of a decree passed on foot of a mortgage executed on the 15th April, 1921; they got symbolical delivery and filed this suit for possession in 1941. The defence raised by the appellant is that before he is ejected, he should be paid Rs. 10,000 which was paid by him towards certain earlier mortgages. The trial Court upheld his plea but the Subordinate Judge awarded only Rs. 2,000 and disallowed the rest of his claim. Hence this second appeal.

There were five mortgages which have given rise to the several questions that arise for decision. One Komaraswami Goundan was the owner of the properties and he effected all the mortgages. The first mortgage was a usufructuary mortgage and the other four were simple mortgages. On the 21st June, 1916, Ex. D-8, a usufructuary mortgage, was executed for Rs. 2,000 to one Samiappan Goundan of items 1 to 3 of the plaint schedule and of another land not included in the suit. On the 13th June, 1917, a second mortgage evidenced by Ex. D-9 was executed for Rs. 2,000 in favour of two persons, Ramaswami, the appellant's father and another Thammanna Goundan. On the 29th August, 1918, there was a third mortgage Ex. D-6 for Rs. 1,000 in favour of Thammanna Goundan. On the 21st March, 1921, Ex. D-12, the fourth mortgage was executed for Rs. 1,000 in favour of the second defendant in the suit. On the 15th April, 1921, the fifth mortgage was executed for Rs. 2,200 in favour of one Chelliah Goundan and Chelliah assigned it to the plaintiffs-respondents.

A suit was filed on the fourth mortgage, Ex. D-12, in O.S. No. 972 of 1925 on the file of the District Munsiff's Court of Dharapuram. The fifth mortgagee was also made a party and in execution of that decree the decree-holder brought the properties to sale and they were purchased on 29th March, 1927, by one Angamuthu for Rs. 2,100. On 6th April, 1927, O.S. No. 414 of 1927 was filed on the fifth mortgage by the plaintiffs-respondents. On the 21st April, 1927, item 1 was sold to the appellant for a sum of Rs. 10,000 under Ex. D-7. The sum of Rs. 10,000 was left with the appellant, the vendee, for the purpose of paying Rs. 2,000 in respect of Ex. D-8 the first mortgage, Rs. 4,000 towards Ex. D-9 the second mortgage, Rs. 1,900 towards Ex. D-6 the third mortgage, and Rs. 2,100 for payment under Order 21, rule 89 of the Civil Procedure Code to set aside the sale in execution of the fourth mortgagee's decree in O.S. No. 972 of 1925. The sale deed declares that there were no other encumbrances than those mentioned in the document and there is a covenant that if there should be any other encumbrances, the vendor should discharge the same from and out of his other properties. The purchase by the appellant was subsequent to the date of the plaint in the fifth mortgagee's suit and that has given rise to the trouble. The fifth mortgagee's suit ended in a decree and the respondents become the purchasers in execution of that decree. They tried to obtain possession but they could not get actual possession of the property. They however got symbolical possession and then commenced the suit out of which this second appeal arises for possession of the property.

The appellant paid Rs. 2,100 into Court under Order 21, rule 89 of the Civil Procedure Code and the sale which had taken place in the execution of the fourth mortgagee's decree was set aside on the 6th June, 1927. Thammanna who had a half share in the second mortgage and who was the sole mortgagee under the third mortgage assigned his interest in both the mortgages in favour of the appellant's father Ramaswami (the co-mortgagee under the second mortgage) and in favour of another Muthuswami. Thus Ramaswami became entitled to three-fourths of the interest in the second mortgage and to a half interest in the third mortgage and Muthuswami became entitled to a one-fourth right in the second mortgage and to a half right in the third mortgage. The appellant paid Muthuswami Rs. 2,325 being the amount due to him. On the 19th May, 1929, the amount of

Rs. 2,000 due under the first mortgage was paid by the appellant and he got into possession of the suit properties. He was thus in possession when the plaintiffs-respondents after purchasing the suit properties in execution of the decree passed on the fifth mortgage attempted to take possession of the properties. As regards the sum due to Ramaswami, the appellant's father, the case is that the appellant and his father are members of a joint family and that Ramaswami and the appellant acted for the joint family of both in the several transactions and that the sums due to the family must be taken to have been discharged by the appellant's purchase. The appellant therefore claims that he should be paid the entire sum of Rs. 10,000 before he is compelled to give up possession.

The plaint mentions that the sale in execution of the suit filed on the fifth mortgage was held subject to the usufructuary mortgage of Rs. 2,000 and that the plaintiffs-respondents purchased the property subject to the usufructuary mortgage. It then states that as the usufructuary mortgage was in force, the respondents could only get symbolical delivery. Paragraph 8 of the plaint states that the appellant obtained a sale deed of the first item after the suit on the fifth mortgage was filed, that the sale deed in favour of the appellant contained recitals that he should discharge some debts, that no provision was made for the discharge of the fifth mortgage, and that the appellant did not discharge any of the debts mentioned in the document. Paragraph 9 states that the second defendant is the senior paternal uncle of the appellant-first defendant and that the two conspired together and jointly or one of them alone paid the amount due under the usufructuary mortgage of the 21st June, 1916, that the first item included in the suit was in the possession of the appellant and that items 2 and 3 were in the possession of the second defendant. Then comes the following statement :—

"If the first defendant should have paid any money towards the usufructuary mortgage there is room for regarding him as a mere volunteer."

Paragraph 10 states that the respondents were entitled to get possession of the suit lands and that the defendants were not entitled to get the usufructuary mortgage amount even by way of subrogation. It is then said that with a view to securing peace the respondents offered the amount of Rs. 2,000 by way of grace and asked the defendants to receive it and deliver possession of the properties and that the defendants did not accept the same and did not deliver possession. The plaint then says :

"If the Court should decide that the plaintiffs should pay such amount as may be due according to law for the scheduled properties out of the above usufructuary amount of Rs. 2,000 or the entire amount of Rs. 2,000 the plaintiffs are also ready to pay it."

On these allegations the Court passed an order holding that the suit was really one for redemption of the usufructuary mortgage and directed the plaintiffs-respondents to amend the plaint as one for redemption of the usufructuary mortgage and to pay court-fee thereon. Paragraph 9-*a* was then added and it runs thus :

"As the Court has directed as per its order dated 22nd October, 1942, to amend this suit as one for redemption and to pay court-fees accordingly, the plaintiffs have under protest amended the plaint as above and paid court-fees."

The amended prayers are those that are found in a suit for redemption.

The main defence put forward by the appellant who is in possession of item 1 is that he is entitled to be in possession until the sums due under the second, third and fourth mortgages are also paid. As regards the fourth mortgage, the contention is that as per his sale deed Ex. D-7 a sum of Rs. 2,246-5-6 was paid for setting aside the sale under O. 21, rule 89 and that the fourth mortgage was thus discharged with the amount advanced by him. As regards the second and third mortgages the appellant states that his father Ramaswami in taking the second mortgage originally along with Thammanna and in taking an assignment of Thammanna's rights under the second and third mortgages acted on behalf of the joint family, that the appellant in taking the sale deed Ex. D-7 and in paying Muthuswami acted for and on behalf of the joint family of himself and his father and that therefore the second and third mortgages must in law be treated as fully paid up. He says

that under the circumstances he is entitled to be paid the sums due under the second, third and fourth mortgages by way of subrogation. He also says that he is entitled to be paid the sum of Rs. 2,000 in respect of the usufructuary mortgage. In the later stages of the suit and in the second appeal before us it was contended that the same result is reached by applying the doctrine of consolidation as the law stood before the Amending Act of 1929 came into force. The Amending Act came into force in April 1930 and it is therefore said that the law as it stood before 1930 governs the rights of the parties as regards both consolidation and subrogation.

The trial Court held that the plaintiffs-respondents are bound to pay Rs. 10,000 to the appellant before getting possession of the first item. On appeal the Subordinate Judge held that the plaintiffs-respondents are bound to pay only Rs. 2,000 the amount due under the usufructuary mortgage and that the appellant is not entitled to the balance of Rs. 8,000 mainly on the ground that the second, third and fourth mortgages were not usufructuary mortgages and that therefore the appellant was not entitled to retain possession of the property until payment of the amounts due under those mortgages. The appellant challenges the decision of the lower appellate Court and claims payment of the full sum of Rs. 10,000 before delivering possession of the item in his possession.

Mr. K. Bashyam, the learned advocate for the appellant, has presented the case from different aspects. The first argument is that the suit is one for redemption of the first item in his client's possession and that in a suit for redemption all the accounts between the mortgagor and the mortgagee must be taken, that their rights and liabilities must be determined after taking all the accounts between them, that his client obtained the right of insisting upon payment of the entire sum due under the four mortgages, by the doctrine of subrogation and also by the doctrine of consolidation and that the lower appellate Court was wrong in refusing the sum of Rs. 8,000 and in confining the relief to a sum of Rs. 2,000.

Of the four mortgages only the first mortgage was a possessory mortgage. The rest were simple mortgages. The appellant purchased the property subsequent to the filing of the suit on the fifth mortgage and was therefore affected by the doctrine of *lis pendens*. The sale to him therefore did not prevail against the decree in the fifth mortgagee's suit and against the auction sale held in pursuance of that decree. The result is that the plaintiffs-respondents who are the auction purchasers became entitled to recover possession of the suit properties and the appellant cannot resist their suit for possession. The appellant, however, claims that he paid the sums due under the four mortgages and that he is entitled to be paid all the sums before being obliged to deliver possession. The lower appellate Court has held that on the authority of the decision of the Judicial Committee in *Bijai Saran Sahi* v. *Rudra Bageshwari Prasad Bahadur Sahi*[1], the appellant cannot retain possession until the payment of the amounts due under the second, third and fourth mortgages, they being only simple mortgages. The facts in *Bijai Saran Sahi* v. *Rudra Bageshwari Prasad Bahadur Sahi*[1] are these. There were three mortgages in favour of the same person, executed in March and April, 1904, securing in all a sum of Rs. 27,999. On the 19th November, 1908, the mortgagor sold the properties in favour of the mortgagee's sons for a sum of Rs. 58,220 the sum then due on the three mortgages. Meanwhile a third party had obtained a money decree against the mortgagor and had attached the suit properties on the 14th September, 1908. Later on, the properties were brought to sale in pursuance of that attachment and the decree-holder purchased the properties in 1909. He then filed the suit which went up to the Judicial Committee for recovery of possession on the strength of the auction purchase. His case was that the sale deed of 19th November, 1908, was invalid against his rights under section 64 of the Civil Procedure Code. The main defence was that the defendants were entitled to set up the three mortgages of 1904 as shields against the plaintiff's claim and that the plaintiff could not claim possession without paying the amounts due under those mortgages. The Judicial Committee held that as the mortgages were not usufructuary mortgages,

1. (1929) 58 M.L.J. 440 (P.C.).

the defendants were not entitled to retain possession until the amounts due under the three mortgages were paid. Their Lordships said this at page 446:

"Now admittedly these mortgages were not usufructuary mortgages, and as the plaintiffs (respondents) have been held to be and are the owners of the equity of redemption it is impossible to see under what title the defendants (appellants) can claim to resist the decree for possession. As stated in the judgment of the High Court, 'They', *i.e.*, the defendants (appellants) 'got possession by virtue of the sale of 19th November, 1908 . . . . . . If the sale is invalid they must surrender possession of the same because their mortgages did not give them any right to possession. Whatever rights (if any) they have under their mortgages they can no doubt enforce in proper proceedings taken for the purpose, but there is no principle or authority which enables the defendants (appellants) as contended by them,' to set up their mortgages as shields against the plaintiffs-respondents' claim for possession. . . . . . ."

If, therefore, all the mortgages which were paid by the appellant were simple mortgages, this decision of the Judicial Committee would be directly in point and the appellant would have to seek his remedies in other appropriate proceedings.

One of the mortgages, however, is a usufructuary mortgage. The appellant got into possession after paying the amount due under the usufructuary mortgage and that was at a time when the Amending Act of 1929 had not come into force. Mr. Bashyam Aiyangar urges that if his right to subrogation in respect of all the mortgages is upheld, the decision of the Judicial Committee just cited would not stand in his way for the reason that the suit is one for redemption, and that in a redemption suit all the rights and liabilities of the mortgagor and the mortgagee must be settled and that enquiries should be ordered as regards all the claims between them. Reliance is placed on the decision of this Court in *Ananthanarayana Aiyar* v. *Sivaramakrishna Aiyar*[1]. That was a suit for partition and recovery of a fourth share of some properties. Three brothers effected a simple mortgage over the properties and under a partition between the three brothers and another brother of theirs, the mortgaged properties were allotted to the four brothers in equal shares. The mortgage debt was also made payable by all the four brothers. Subsequently, the mortgagee filed a suit on his mortgage impleading only his mortgagors, the three brothers. The suit ended in a decree and the properties were brought to sale and purchased by him. The fourth brother's share was purchased by the plaintiff and he filed a suit for partition and recovery of a quarter share. The defence was that the plaintiff should be directed to pay the one-fourth sum due under the mortgage before getting possession. The learned Chief Justice and Krishnaswami Aiyangar, J., held that the plaintiff was bound to pay one-fourth of the sum due under the mortgage before getting partition and possession of the quarter share. They were pressed with the decision of the Judicial Committee in *Bijai Saran Sahi* v. *Rudra Bageshwari Prasad Bahadur Sahi*[2], and the learned Judges pointed out that the decision of the Judicial Committee did not stand in the way of the defendant claiming the relief which they granted. They said this:

"We have here a case of an owner of an one-fourth share suing for a partition and recovery of that share against the owner of the remaining three-fourths who was also a mortgagee of the suit property as well as of certain other properties. In such a suit it is the duty of the Court to adjust the rights and liabilities *inter se* between the parties and to determine the shares on such adjustment. To ignore the liability of one of the parties to the other or others and proceed merely to effect a division without regard to it, is to ignore the very character of the suit and the nature of the relief which the Court is bound to grant . . . . . That the mortgage in favour of the first respondent did not confer upon him a right to possession is immaterial where, as here, the suit is one for partition calling for the adjustment of mutual rights and liabilities. The decision of the Privy Council in *Bijai Saran Sahi* v. *Rudra Bageshwari Prasad Bahadur Sahi*[2], which related to a simple suit for possession by an owner of the equity of redemption against a mortgagee who had no right to possession has no bearing in the present connection."

On the strength of this decision it is contended that in the case before us the suit is not merely one for possession but is in substance and in form one for redemption of the usufructuary mortgage and that in a suit for redemption all the accounts should be settled between the parties. Mr. Bashyam Aiyangar urges that even as originally framed, the suit was one for redemption. It is pointed out that in their plaint the plaintiffs-respondents categorically admitted that their purchase

1. (1943) 1 M.L.J. 100.
2. (1929) 58 M.L.J. 440 (P.C.).

was subject to the usufructuary mortgage (paragraph 5) and that they offered to pay the sum of Rs. 2,000 to the defendants (paragraph 10). Reference is also made to the statement that if the Court should hold that the plaintiffs were bound in accordance with law to pay the amount of the usufructuary mortgage, they were willing and ready to pay the same. The view of the trial Court that the suit was in substance one for redemption is claimed to be a correct order and it is pointed out that the plaintiffs actually amended the plaint into one for redemption. The fact that there is a statement that the amendment was made under protest is said to be of no avail. We are of opinion that the suit even to start with was one for redemption and that after the amendment the plaintiffs-respondents are not entitled to go back upon the position and contend that the suit is not one for redemption. The mere fact that they chose to mention that they amended the plaint under protest is not really material and cannot affect the position that at any rate the suit as it went to trial was really one for redemption of the usufructuary mortgage.

Treating the suit as one for redemption of the usufructuary mortgage the question is whether the appellant is entitled to be paid not merely the amount of the usufructuary mortgage but also the amounts due under the other three mortgages. Mr. K. V. Krishnaswami Aiyar, the learned advocate for the respondents, put forward several arguments in support of the position that the appellant is not entitled to payment of these sums. The first is that the appellant paid the amount in pursuance of the covenant contained in the sale deed Ex. D-7 and that a covenant excludes subrogation. His next argument is that for the application of the doctrine of conventional subrogation under the law as it stood before the amendment of 1930 there must be an agreement between the alienee and the mortgagor or the mortgagees that he should be subrogated to the rights of the mortgagees who were to be paid off with the amounts advanced by him. He next urges that the sale under which the appellant get the right to the property was *lis pendens*, that as far as he is concerned, the sale must be treated to have been non-existent as it was ineffectual in law to affect his rights and that therefore the appellant, when he paid the money, was a mere volunteer and therefore not entitled to the rights of subrogation. The next is that the second and third mortgages have not been fully paid and that partial subrogation is not allowed in law. Mr. Krishnaswami Aiyar challenges the truth of the appellant's case that he and his father are members of an undivided family. The last argument on this part of the case is that even if the appellant is entitled to subrogation in respect of the second, third and fourth mortgages, the appellant can enforce those mortgages subject to the law of limitation in independent proceedings and that he cannot use them as shields in the present suit.

As already stated, the appellant also relied upon the doctrine of consolidation and his case is that if before the amendment of the Transfer of Property Act came into force in April 1930 there were several mortgages on the same property and they all became united in one and the same person, that person can insist upon redemption of all the mortgages and deny the mortgagor the right of redeeming one of the mortgages leaving the others unpaid. It is urged that this was the law even before the Transfer of Property Act of 1882, that the Legislature while passing the Act of 1882, abolished consolidation only where the mortgages were on different properties and by implication enacted that the rule of consolidation should be applicable when the different mortgages were on the same property. For this the decision of the Judicial Committee in *Ramarayanimgar* v. *Maharajah of Venkatagiri*[1] is relied upon. The Judicial Committee there held that section 61 of the Transfer of Property Act enacts by implication that a mortgagor cannot redeem without paying money due on a separate mortgage or on a separate charge on the same property. To this Mr. Krishnaswami Aiyar has attempted various answers. It is said that the right of consolidation is claimed after the amended Transfer of Property Act came into force in 1930, that in applying the rule of consolidation one must have regard to the

1. (1926) 52 M.L.J. 338 : L.R. 54 I.A. 68 : I.L.R. 50 Mad. 180 (P.C.).

law as it stands when the right of consolidation is claimed, *i.e.*, the law prevailing at the time of the suit; and that as section 61 as amended has abolished consolidation even when the several mortgages are on the same property, the appellant cannot claim the right of consolidation. The next argument is that consolidation is not a vested right but only a privilege given to the person in whom several mortgages happen to be united for the time being of asking that all the mortgages should be redeemed at one and the same time and that a privilege not being a vested interest is not governed by the rule that vested rights cannot be affected by subsequent legislation. It is also urged that the Amending Act of 1929, in so far as it amended section 61 of the Transfer of Property Act was declaratory in character and section 24 of Act XX of 1929 really states what the law always was, and not that the prior section 61 was amended. Yet another argument is that consolidation can be claimed only in respect of the mortgages which are alive on the date of the plaint and that it cannot be claimed in respect of mortgages which had become barred before the date of suit.

We shall now take up the question of subrogation and first deal with the argument that "covenant excludes subrogation." That a covenant excludes subrogation, though a compendious method of expressing one aspect of the law of subrogation, is really a misleading statement unless we bear in mind the true implications of that statement. If there are two mortgages, *A* and *B*, and a subsequent alienee undertakes to pay off both the mortgages and pays *A* and does not pay *B*, he cannot take advantage of his own default and claim subrogation as against the holder of the mortgage *B*. In such a case his covenant to pay both the mortgages *A* and *B* prevents him from claiming the right of subrogation when he pays off *A* and defaults in payment of the mortgage *B*; in other words covenant excludes subrogation. This has been laid down in *Govindaswami Tevan* v. *Doraiswami Pillai*[1], *Lakshmi Amma* v. *Sankaranarayana Menon*[2] and by the Judicial Committee in *Ayyareddi* v. *Gopalakrishnayya*[3]. The rule rests upon quite an intelligible principle that a person cannot claim subrogation as against the very mortgagee whose debt he has also undertaken to discharge from and out of the purchase money in his hands. In such a case, the purchaser retains the whole of the property which he purchased and would not pay the entire purchase money in discharge of all the mortgages which he had undertaken to pay up. He discharges only one or two and claims that he is entitled to rights of subrogation as against the holder of the other mortgage which he was bound to discharge and which he did not pay. In all these cases we may say that covenant excludes subrogation; but a covenant to have that effect must be a covenant to discharge the debt of the very mortgagee against whom subrogation is claimed. Mr. Krishnaswami Aiyar relies upon two decisions of the Judicial Committee in *Ayyaredai* v. *Gopalakrishnayya*[3] and *Jagmohan Das* v. *Jugal Kishore*[4] in support of the wider proposition that if an alienee undertakes to pay certain mortgages from and out of the amount payable under the alienation taken by him, he cannot claim subrogation in respect of those mortgages. In other words, the term "covenant" is the covenant to pay the earlier mortgages and is not the covenant to pay the later mortgage. In *Ayyareddi* v. *Gopalakrishnayya*[3], a property was subject to three simple mortgages of which the second was on the crops as well. After the three mortgages, the right, title and interest of the mortgagor was brought to sale in execution of a money decree and was sold subject to the mortgages. One Pingala became the purchaser. The second mortgagee then filed a suit upon his mortgage and certain payments were made by Pingala and by the alienees of his right. Meanwhile the third mortgagee filed a suit on his mortgage, obtained a decree and brought the properties to sale in execution of his decree. The sale was held free of all mortgages. After payment to the first mortgagee, there was a sum of Rs. 1,327 remaining to the credit of the suit. The respondents before the Judicial Committee who were the purchasers from Pingala,

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1. (1910) 20 M.L.J. 380 : I.L.R. 34 Mad. 119.
2. (1935) 70 M.L.J. 1 : I.L.R. 59 Mad. 359 (F.B.).
3. (1923) 46 M.L.J. 164 : L.R. 51 I.A. 140 : I.L.R. 47 Mad. 190 (P.C.).
4. (1931) 36 C.W.N. 4 (P.C.).

claimed the amount by way of subrogation. The third mortgagee decree-holder resisted the claim and said that he was entitled to the amount as the second mortgage had really been discharged. His contention was that " when the owner of a property subject to several mortgages pays off a prior mortgage, he is not entitled to stand in the shoes of the prior mortgagee but is to be taken as clearing the property from prior encumbrances for the benefit of the later mortgagee." The Judicial Committee first held in favour of the respondents on another point as well which does not need mention here. Then they dealt with the question whether Pingala's representatives were entitled to be subrogated to the rights of the second mortgagee. Their Lordships said this on page 194 :

> "It is now settled law that where in India there are several mortgages on a property, the owner of the property, subject to the mortgages, may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case there was no such personal covenant."

Mr. Krishnaswami Aiyar relies upon the last sentence and urges that if there was a personal covenant to pay, the rule of subrogation would be avoided. We are unable to agree with this contention. Taking the passage relied upon it says that the rule would not apply if the owner of the property had covenanted to pay the later mortgage debt. It is clear that the covenant which the Judicial Committee was referring to was a covenant to pay " *the later mortgage debt* " ; that is, the debt of the person against whom subrogation was claimed. Their Lordships expressly refer to the covenant as one to pay the *later* mortgage debt. How Mr. Krishnaswami Aiyar wants to read is that if there is a covenant to pay the earlier mortgages, the rule of subrogation will not avail as even against a later undisclosed mortgage.

This decision of the Judicial Committee does not lay down any such proposition. Further there was no covenant at all on the part of Pingala the subsequent purchaser as he was a purchaser in Court auction who merely purchased the property subject to all the mortgages. Thus there was no covenant to pay the third mortgage. The Judicial Committee made the remarks relied upon when pressed with the argument that the purchase in Court auction was subject to all mortgages, that therefore the purchaser had covenanted to pay all the three mortgages and that therefore the purchaser when paying off the second mortgage was not entitled to subrogation as against the third mortgage. Their Lordships pointed out that that rule would apply if the person who claimed the rights of subrogation had personally covenanted to pay the later mortgagee against whom he claimed subrogation. That this is the correct understanding of their Lordships' decision has been pointed out by Venkatasubba Rao, J., in *Srinivasalu Naidu* v. *Damodaraswami Naidu*[1], and by Varadachariar, J., in *Lakshmiammal* v. *Sankaranarayana Menon*[2]. Venkatasubbarao, J., said this :

> "If a person buys for Rs. 10,000 properties subject to mortgages in favour of *A* and *B*, agreeing to pay out of the consideration Rs. 6,000 to *A* and Rs. 4,000 to *B*, it stands to reason, that if he pays off *A* alone, he cannot have priority against *B*, for the very essence of the transaction is, that he makes himself liable to pay off both *A* and *B*, and by failing to pay off *B*, he cannot be permitted to make an illegal profit of Rs. 4,000. That is the ratio of *Govindaswami Tevan* v. *Doraiswami Pillai*[3] and *Lakshmi Achi* v. *Narayanaswami Naicker*[4], already referred to."

Their Lordships of the Privy Council in *Ayyareddi* v. *Gopalakrishnayya*[5], after declaring that it is settled law that the purchaser may by paying off an earlier charge treat himself as buying it and stand in the same position as his vendor, go on to add the following limitation, which gives effect to the principle abovementioned :

> "This rule would not apply if the owner of the property (by which expression is meant the purchaser) had covenanted to pay the later mortgage debt . . . . ."

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1. A.I.R. 1938 Mad. 779.
2. (1935) 70 M.L.J. 1 : I.L.R. 59 Mad. 359 (F.B.).
3. (1910) 20 M.L.J. 380 : I.L.R. 34 Mad. 119.
4. (1929) 57 M.L.J. 746 : I.L.R. 53 Mad. 188.
5. (1923) 46 M.L.J. 164 : L.R. 51 I.A. 140 : I.L.R. 47 Mad. 190 (P.C.).

In *Lakshmi Ammal* v. *Sankaranarayana Menon*[1], Varadachariar, J., referred to the decision in *Ayyareddi* v. *Gopalakrishnayya*[2] and says this:

> "The observation already extracted from the judgment of the Privy Council in *Ayyareddi* v. *Gopalakrishnayya*[2] shows that that is not the true basis of the rule, but an inference derived from or a disability founded on the fact *that the person claiming subrogation has covenanted to discharge the debt due to the very person against whom he seeks to claim priority*." (The italics are ours.)

Another decision of the Privy Council which was relied upon by Mr. Krishnaswami Aiyar is *Jagmohan Das* v. *Jugal Kishore*[3]. It is urged that this decision is a direct authority for the position that in every case in which money is paid by the later alienee in performance of a covenant to pay the whole or a portion of the purchase money to an earlier mortgagee, the alienee cannot claim any right of subrogation. The judgment of the Judicial Committee in this case was merely an endorsement that the judgment of the Oudh Court was right. The Judicial Committee say this:

> "All the points urged before this Board in support of the present appeal have been effectively dealt with in the judgment of the Oudh Court and their Lordships agree fully with that judgment."

Now turning to the judgment of the Oudh Court we find the following facts. One Baktarwar Begum inherited some properties from her father who had effected a mortgage in 1896 of two villages in favour of the Maharaja of Balrampur. Baktarwar Begum sold to one Inderprasad a half share in the two mortgaged villages and a half share in some other villages. Part of the consideration for the transfer was that the vendee should pay half the amount due to the Maharaja of Balrampur. Inderprasad, the vendee, did not pay the amount to the Maharaja of Balrampur, but continued in possession of the half of all the villages which he purchased. Then the Maharaja of Balrampur instituted a suit on the basis of his mortgage of 1896, obtained a decree and brought the properties to sale. After the sale was held Inderprasad's representative paid the necessary amount under Order 21, rule 89, Civil Procedure Code and had the sale set aside. He then filed the suit out of which the appeal arose for recovering all that he paid. The suit by Inderprasad's representative was against the owner of the other half and he claimed that he was entitled to get not merely the half of the debt which was payable on the other half of the property which was owned by the defendant but the whole of the amount which he paid. The plaintiff was still in possession of the half which he had purchased. The claim was really one of contribution by the owner of a half of the mortgaged properties as against the owner of the other half, the plaintiff claiming not merely the half which the other co-owner was under law bound to pay but the whole amount including what he himself had undertaken to pay as consideration for his own purchase. Put briefly, Baktarwar Begum sold to Inderprasad one half of the property and the vendee undertook to pay half the mortgage debt as consideration for the sale. Inderprasad did not pay and the mortgagees filed a suit and obtained a decree. A sum of Rs. 45,000 was paid by Inderprasad's representative and he filed the suit against the owner of the other half, who we may take to be Baktarwar Begum herself, for recovery of the entire amount. On these facts, Inderprasad or his representative obviously cannot claim from the defendant who owned the other half the amount which he himself had contracted to pay as the sale consideration. Inderprasad or his representative was not deprived of what he had purchased by his sale deed. He was still in possession and enjoyment of the half which he had purchased and there were no intermediate encumbrances or any other outstanding claim in another person which would deprive him of the full benefit of what he had bargained for. Nor did the sale to him fail either for lack of registration or anything of the kind. Baktarwar Begum or her representatives did nothing to deprive Inderprasad or his representative of what he had purchased under the sale deed. Therefore the case was purely one in which the purchaser of a half retained that half and still claimed even the amount which he had contracted to pay for his purchase. Strictly the question whether a person

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1. (1935) 70 M.L.J. 1 : I.L.R. 59 Mad. 359 (F.B.).
2. (1923) 46 M.L.J. 164 : L.R. 51 I.A. 140 : I.L.R. 47 Mad. 190 (P.C.).
3. (1931) 36 C.W.N. 4 (P.C.).

is entitled to be subrogated to the rights of a mortgagee who has been paid off arises where the person had bargained for certain rights in the property and it ultimately turns out that he is deprived of the whole or a portion of such rights because of the existence of a mesne encumbrance as in *Gokuldas Gopaldas* v. *Purnamal Premsukdas*[1] or of an attachment as in *Dinabandu Shaw Chowdhry* v. *Jogmaya Dasi*[2], or of the refusal of the mortgagor to fulfil the contract as in *Oonnamalai Ammal* v. *Narasimharao Naidu*[3] or of the existence of a co-owner on whom the sale or mortgage is held not binding as in *Chama Swami* v. *Padala Anandu*[4] or of a prior contractee whose claim is held to prevail as in *Syamalarayudu* v. *Subbarayudu*[5]. In all such cases it will be observed that the subsequent mortgagee or vendee is deprived of the whole or a portion of what he had bargained for. The decision in *Jagmohan Das* v. *Jugal Kishore*[6] is really a case where a person who paid the money *retained what all he had bargained for*, would not pay what he had undertaken to pay as the consideration for the purchase made by him and yet wanted to claim against the owner of the other half the entire amount paid for discharge of the common mortgage. It is really a case of contribution, and a person paying off a common mortgage cannot claim what is payable on his own property. The judgment of the Oudh Court in dealing with this question is very brief and they say this :

"The vendee obtained a half share. He agreed to pay for the half share . . . . The second point which he takes is that he should be given credit for the full amount to satisfy the decree. There again is no force in that. He was obliged under the terms of the deed of sale to satisfy one half of the liability."

Then they go to another point. The judgment of the Privy Council is therefore no authority for the proposition that the mere fact that the money which was paid to the earlier mortgagee was part of the purchase money which the later vendee covenanted to pay deprives the vendee without anything more of the right of claiming subrogation. It is clear that the plaintiff in the case of *Jagmohan Das* v. *Jugal Kishore*[6], was claiming the right not against any person who claimed any interest in the half which he purchased but against the owner of the other half who had no interest in the half which he had purchased. Against the other owner or owners of the other shares he cannot get the whole amount including that which he had bargained to pay for his own share. When a person takes an alienation by way of a sale or a mortgage for the purpose of discharging earlier mortgages, a prudent alienee would not pay the amount into the hands of the mortgagor who may not pay the earlier mortgages but who may misapply the money for his own purposes. In the vast majority of cases the vendee or mortgagee would retain the money in his hands in order to pay off the earlier mortgages and the deed would recite that the money was left with the later vendee or the later mortgagee in order to pay the earlier mortgages. This would be in the form of a covenant by the later alienee to pay off earlier mortgages. If in such cases there is an intermediate encumbrance or the like, the later alienee ought not to be deprived of the right of subrogation merely because the later alienee retained the price in his own hands to pay off the earlier mortgages.

The decision of this Court in *Chidambaram Nadan* v. *Muni Nagendrayyan*[7] is very instructive. The only difference between that case and this is that in this case the later alienee who claims subrogation is a purchaser and there it was a mortgagee. Dealing with the question whether a direction that the later encumbrancer should discharge the earlier mortgage would deprive him of the right of subrogation, the learned Judges said this on page 449 :

"It is obvious that in the vast majority of cases such an arrangement would be made for the protection of the subsequent mortgagee. The mortgagor probably wants the money for himself rather than to discharge his existing debts and the origin of such a stipulation is most likely to be a distrust felt by the subsequent mortgagee as to the use to which the moneys would be put if he handed

1. (1884) L.R. 11 I.A. 126 : I.L.R. 10 Cal. 1035 (P.C.).
2. (1901) 12 M.L.J. 73 : L.R. 29 I.A. 9 : I.L.R. 29 Cal. 154 (P.C.).
3. (1937) 47 L.W. 40.
4. (1908) 18 M.L.J. 306 : I.L.R. 31 Mad. 439.
5. (1897) I.L.R. 21 Mad. 143.
6. (1931) 36 C.W.N. 4 (P.C.).
7. (1920) 39 M.L.J. 445.

them direct to the mortgagor, who, instead of discharging the prior encumbrance, might squander the money for his own purposes. We think that a mortgagee who inserts in the mortgage bond the stipulation that he and not the mortgagor shall pay off the prior encumbrance can, in the absence of any indication to the contrary, be rightly presumed to have wished to make that payment by his own hand with a view to keep the prior encumbrance alive for his own benefit."

The later mortgagee was held entitled to subrogation. These observations apply equally to a case of a later purchaser who takes the precaution of retaining the whole or a portion of the price in his own hands for the purpose of paying off the earlier mortgage.

We respectfully adopt the observations of Venkatasubba Rao and Abdur Rahman, JJ., in *Srinivasalu Naidu* v. *Damodaraswami Naidu*[1]. The point was put before them in a slightly different form that where the earlier mortgage was discharged from the purchase money, there would be no right of subrogation, as the money paid was that of the mortgagor. The learned Judges pointed out, after referring to the decisions of the Judicial Committee in *Dinabandho Shaw* v. *Jagmaya Dasi*[2] and *Mohamed Ibrahim Hussain Khan* v. *Ambika Pershad Singh*[3] that the mere fact that the amounts paid towards the earlier mortgages came out of the consideration of the later mortgage does not deprive the later mortgagee of the right of subrogation.

Another point to be noticed in connection with the expression "covenant excludes subrogation" is that the covenant must be with the original mortgagor who was personally bound to pay the mortgage or his heir-at-law. If the original mortgagor or his heir-at-law pays a mortgage, he cannot use it as a shield against a subsequent mortgagee from him. In such case, being personally bound to pay both the mortgages, he cannot claim subrogation. But if an assignee from him or a Court auction purchaser of his interest or a subsequent mortgagee pays a mortgagee he can on the decision in Gokuldas's case and by virtue of sections 91 and 92 first paragraph claim the right of subrogation. If such a person sells his right to another and directs his vendee to pay the earlier mortgage and the vendee pays it in pursuance of such a covenant, he cannot obviously be denied the right of subrogation. A vendee always gets all the rights of his vendor. If the vendor would get a right of subrogation, a vendee from him must also get the right when he makes the payment even though the payment is made in performance of a covenant claimed in his sale deed. The equitable rule of subrogation gives a vendee a higher right than what the vendor has if certain conditions are fulfilled. Though the original mortgagor who is personally bound to pay is not entitled to subrogation when he pays an earlier mortgagor, a vendee or a mortgagee from him may be entitled to this right if the case satisfies the requirements of law as already discussed. Thus the word "mortgagor" used in the expression "A person who has advanced money to a mortgagor" occurring in paragraph 3 of section 92 of the Transfer of Property Act as amended must be understood to mean the original mortgagor who was personally bound to pay and his legal heir. This position has been discussed by one of us in *Linganna Naicker* v. *Ponnuswami*[4]. Thus the expression "covenant excludes subrogation" has to be understood subject to these and possibly other limitations as well.

While on the question of subrogation, we consider it necessary to refer to the judgment of the Privy Council delivered by Lord Romer in *Jankinath Ray* v. *Pramathanath Malik*,[5] which has been re-affirmed by the Judicial Committee in a later pronouncement of theirs, in *Man Mohan Das* v. *Janki Prasad*[6]. The facts of the former case are these: There were five mortgages in succession (1) First mortgage by the first respondent of his property A in favour of the appellant on 8th April, 1924, for a sum of Rs. Two lakhs, the said sum being repayable on 8th April, 1925. (2) Second mortgage by the first respondent of property A as well as property B in favour

1. A.I.R. 1938 Mad. 779.
2. (1901) 12 M.L.J. 73: L.R. 29 I.A. 9: I.L.R. 29 Cal. 154 (P.C.).
3. (1912) 22 M.L.J. 468: L.R. 39 I.A. 68: I.L.R. 39 Cal. 527 (P.C.).
4. S.A. No. 707 of 1944 (unreported).
5. (1940) 1 M.L.J. 446: L.R. 67 I.A. 82: I.L.R. (1940) 1 Cal. 291 (P.C.).
6. (1945) 1 M.L.J. 97: L.R. 72 I.A. 39: I.L.R. 1945 Kar. 73 (P.C.).

of the same person on 30th November, 1925, for a sum of one lakh of rupees repayable on 30th November, 1926. Property B was also to be additional security for the first mortgage. (3) Third mortgage by the first respondent in favour of the same person of properties, A and B and C on 29th November, 1926, for a sum of Rs. One lakh repayable on 28th November, 1927, with similar stipulations with regard to properties B and C forming respectively additional security for the earlier mortgages. (4) Fourth mortgage of properties A, B, C and D by the same person in favour of the mortgagee of the three previous mortgages and another on 11th November, 1927, for a sum of Rs. One and a half lakhs repayable on 11th November, 1929. Stipulation similar to those in the previous mortgages were repeated. (5) Fifth mortgage of A, B, C and D and other properties in favour of a different person, the fourth respondent, on 27th December, 1927, for Rs. Seven lakhs and a quarter. The mortgage money was left with the fourth respondent to pay off all the four prior mortgages. By that time the time for payment of the first three mortgages had elapsed ; but the fourth mortgage was repayable only much later in 1929. So it was stipulated in the fifth mortgage that upon payment by the fifth mortgagee of the amount due under the first three mortgages, he should be subrogated to the right under those three mortgages. The mortgagee paid the first three mortgages in full but did not pay the fourth mortgage of 11th November, 1927. The fourth mortgagee sued upon his mortgage in 1931 for sale of all the four items on the averment that the first three mortgages had been discharged and extinguished. Upon these facts, the High Court held that the fourth respondent (the fifth and last mortgagee) stood subrogated to the rights under the first three mortgages which he paid off. The Privy Council affirmed the decree of the High Court on the question of subrogation. Their Lordships cited with approval the law on that point as expressed by Mookerjee, J., in the case of *Gurdeo Singh* v. *Chandrikah Singh*[1] where the learned Judge said :

> "It may be said in general, that to entitle one to invoke the equitable right of subrogation he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected."

Applying this test, their Lordships found that as the law stood prior to the amendment of section 92 of the Transfer of Property Act by the Amending Act XX of 1929 the fourth respondent in terms contracted with the mortgagor that on payment of the first three mortgages out of the money advanced by him, he was to be subrogated to the rights of the appellants under these mortgages. The decision rested on the express agreement with the mortgagor that the person who advanced money to pay off the first three mortgages was to be subrogated to the rights under those three mortgages. This is within the rule laid down by Mookherjee, J., and approved by the Judicial Committee. The case would also satisfy the third paragraph of section 92 as amended by the Act of 1929.

In *Man Mohan Das* v. *Janki Prasad*[2] the dictum of Mookherjee, J., approved in *Jankinath Ray* v. *Pramathanath Mullick*[3] was again reproduced and adopted and it was stressed that if a person was not the surety of the debt or was not otherwise interested in the property, he must prove, in order to succeed on the equitable doctrine of subrogation, that there was an agreement between him and the debtor or creditor that he should receive and hold an assignment of the debt as security. They also pointed out that the right of subrogation which could be claimed or granted on very slight evidence or what may be described as a semblance of an agreement prior to the amendment of the Act could not be so claimed or granted after the amendment as under section 92 of the Transfer of Property Act as it now stands, the right of subrogation can be claimed by the lender only if the mortgagor has by registered instrument agreed that he shall be so subrogated. They said this :

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1. (1907) I.L.R. 36 Cal. 193 at 217.
2. (1945) 1 M.L.J. 97 : L.R. 72 I.A. 39 : I.L.R. (1945) Kar. 73 (P.C.).
3. (1940) 1 M.L.J. 446 : L.R. 67 I.A. 82 : I.L.R. (1940) 1 Cal. 291 (P.C.).

"After the amendment of the Act the rights of subrogation can be claimed by the lender only if mortgagor has by a registered instrument agreed that he shall be so subrogated. The right can no longer be claimed or granted as before, on very slight evidence or what may be described as the semblance of an agreement. In the present case, in their Lordships' view, there is no such evidence or semblance of an agreement between the appellant and the idol or the creditor."

Mr. Krishnaswami Aiyar urges that the present case is really one of conventional subrogation and not of legal subrogation, and that in the case of conventional subrogation the fact to be proved is an agreement express or implied with either the mortgagor or the mortgagee that the alienee who advances money under his sale or mortgage should be subrogated to the rights of the mortgages which are paid off with the money advanced by him ; and that in a case of legal subrogation which arises when a person who has a pre-existing interest in the property when he pays off an earlier mortgage, the question would be one of intention whether the party intended to keep alive the original mortgage or to discharge the mortgage. But it will be seen that in *Dinabandho Shaw Chowdhury* v. *Jagmaya Dasi*[1], and in *Mohamed Ibrahim Husain Khan* v. *Ambika Pershad Singh*[2], the moneys were advanced by the later mortgagee who had no prior existing interest and the cases involved conventional subrogation. In both the cases the Judicial Committee considered the case from the standpoint of the intention of the parties to the later mortgage whether it was that the earlier mortgages should be kept alive for the benefit of the later mortgagee who advanced the money with which the earlier mortgages were paid off. When there is such an intention, we can well say that it amounts to a contract express or implied that the later alienee should be subrogated to the rights of the earlier mortgages which are discharged with the money advanced by him. In this case also the covenant that the properties are sold free of all encumbrances and that if there were any other mortgages, the vendor would pay them from his other properties may well be taken to be evidence of the contract between the vendor mortgagor and the vendee that the vendee should be subrogated to the rights of the mortgagees who were to be paid from the money advanced by the vendee.

Then Mr. Krishnaswami Aiyar urged that no facts have been proved in this case to find a case of implied agreement. We are of opinion that the stipulation in Ex. D-7 that the sale was to be free from all mortgages is a sufficient indication that there was an implied agreement that the mortgages were to be kept alive for the benefit of the later alienee. In *Subbarayudu* v. *Lakshminarasamma*[3], Venkataramana Rao and Newsam, JJ., said this at page 544 :

"Where a person advances money to discharge a mortgage and takes a mortgage or sale, the presumption is that the mortgage is extinguished. But if it is shown that there is an intermediate encumbrance or other circumstances which raise equity in his favour, the presumption shifts or is rebutted and an agreement with the borrower that the mortgage was to be kept alive is presumed or implied. The agreement is often implied from such circumstances as an arrangement with the mortgagor that after the discharge of the mortgage the mortgage deed should be surrendered to him and a new document would be executed in his favour *or a sale free from encumbrances*." (The italics are ours.)

In *Mohamed Ibrahim Husain Khan* v. *Ambika Pershad Singh*[2] referred to by Venkataramana Rao and Newsam, JJ., in support of the above rule the alienation to Alfan, the subsequent alienee stipulated that the alienation was to be free from all encumbrances. That was held to give rise to an intention to keep alive the earlier mortgages. The Judicial Committee said at page 553 :

"It is true that so far as the *zarpeshgi* deed of 20th of November, 1874, operated as a lease of the mortgaged properties, it came to an end on the payment of the *zarpeshgi* debt of Rs. 12,000 to the representatives of Girwar Singh on the 15th July, 1888, but their Lordships have found as a fact that the Rs. 12,000 were lent by Musammat Alfan and were borrowed by Kishan Kumar Singh for the express purpose of paying off the *zarpeshgi* debt of Rs. 12,000, which was secured by the deed of the 20th of November, 1874 ; that the Rs. 12,000 lent by Musammat Alfan were in accordance with the agreement between Musammat Alfan and Kishan Kumar Singh applied in paying off the *zarpeshgi* debt, that on payment of that debt the *zarpeshgi* deed of the 20th November, 1874, was handed over to Musammat Alfan, and that Musammat Alfan when she lent her Rs. 12,000 intended to keep alive for her benefit and protection the charge which had been created by the *zarpeshgi* deed of the 20th of November, 1874."

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1. (1901) 12 M.L.J. 73 : L.R. 29 I.A. 9 : I.L.R. 39 Cal. 527 (P.C.). I.L.R. 29 Cal. 154 (P.C.)
2. (1912) 22 M.L.J. 468 : L.R. 39 I.A. 68.
3. (1939) 2 M.L.J. 533.

In dealing with that case which was one of a person who got an interest in the property by advancing money for the first time, the Judicial Committee applied the rule laid down by the Board in *Gokuldas Gopaldas* v. *Puranmal Premsukdas*[1], which was a case where the person had a pre-existing interest. In the present case it is clear that the property was sold free of all mortgages. The facts in this case are analogous to those in *Mohamed Ibrahim Husain Khan* v. *Ambika Pershad Singh*[2]. We are of opinion that the sale having been expressly stated to be free from all mortgages, the rule laid down by Venkataramana Rao and Newsam, JJ., in *Subbarayudu* v. *Lakshminarasamma*,[3] is satisfied in this case.

The next point raised is that the purchase by the appellant was *pendente lite* and that the purchase must be treated as non-existent so far as the plaintiff is concerned. We are unable to accept this argument which is based on section 52 of the Transfer of Property Act. Section 52 does not render a sale made *pendente lite* void. It is valid for all purposes, but it has to give way as against rights created under the decree passed in the suit. For instance if in the suit on the fifth mortgage money had been paid by the mortgagor or if the decree amount was satisfied by the sale of properties other than item No. 1 then the sale of item 1 would have been perfectly valid against all the world. But as the fifth mortgagee purchased this item in execution of his decree, the right which the appellant got under his sale is not available to him. Therefore to that extent he loses the right which he bargained for under his sale deed; but this is far from saying that the sale should be treated as non-existent and that the appellant must be relegated to the position of a mere volunteer when he paid off the earlier mortgages. In fact in *Syamalarayudu* v. *Subbarayudu*[4] there was first a contract to sell the properties in favour of *A*. Then the property was sold to *B*. *A* filed a suit for specific performance of the contract in his favour and pending the suit *B* paid off an earlier mortgage in order to substantiate his case that he was a *bona fide* purchaser. It will be observed that the subsequent purchaser who takes the property with notice of a prior contract does not get any right as against the prior contractee. The prior contractee when he obtains a decree for specific performance obtains a right which prevails over the subsequent alienee. The position is analogous to the case before us where by reason of a suit having been filed and the alienation having taken place subsequent to the date of the plaint, the alienation has to give way to the respondent's purchase in execution of the decree passed in the suit. In *Syamalarayudu* v. *Subbarayudu*[4] the learned Judges held that the subsequent purchaser who paid off the earlier encumbrance, though the payment was after the suit for specific performance, started, was entitled to subrogation in respect of the earlier mortgage which he paid. The fact that the sale in favour of the person who paid off the earlier encumbrances was subsequently found to be ineffectual as against a prior contractee by virtue of section 27 (*b*) of the Specific Relief Act was held not to exclude the right of subrogation. For the same reason we hold that the fact that the appellant's purchase became unavailable by virtue of section 52 of the Transfer of Property Act as against the person who filed his suit prior to the sale to the appellant is not a ground for excluding the right of subrogation.

The next question that arises is whether the second and third mortgages have been fully discharged. As already stated, the second mortgage was taken in the name of the appellant's father Ramaswami and another Thammanna and the third mortgage was taken in the sole name of Thammanna. Thammanna transferred his right under the second and third mortgages to both Ramaswami and another Muthuswami. Muthuswami alone was paid the sum due to him, that being half the amount due under the third mortgage and one-fourth of the amount due under the second mortgage. It is urged by Mr. K. V. Krishnaswami Aiyar that the first defendant's father has not been paid and that therefore the appellant is not entitled to the rights of subrogation. The appellant seeks to get over

1. (1884) L.R. 11 I.A. 126 : I.L.R. 10 Cal. 1035 (P.C.).
2. (1912) 22 M.L.J. 468 : L.R. 39 I.A. 68 : I.L.R. 39 Cal. 527 (P.C.).
3. (1939) 2 M.L.J. 533.
4. (1897) I.L.R. 21 Mad. 143.

this trouble by alleging that his father acted for and on behalf of the joint family of himself and the appellant in taking the second mortgage and in taking a transfer of the rights of Thammanna, aforesaid and that the appellant acted for the joint family when taking the sale deed in question. The trial Court has gone into the question very elaborately and has accepted the appellant's case on this point. That Court finds that the first defendant and his father were members of an undivided family, that the second mortgage was originally taken for the benefit of the joint family, that in taking the transfer of Thammanna's rights the father acted on behalf of the joint family, and, what is more, that the sale in the name of the appellant was likewise taken for the benefit of the joint family. The appellate Judge has not dealt with the matter at length, but we think there is enough to show that he concurs in the opinion of the trial Court. In paragraph 18 the appellate Judge says this :

"As regards the fourth mortgage the amount was deposited into Court and the sale was set aside. Therefore there can be no doubt that the mortgage was also discharged. The evidence discloses that the other two mortgages were also discharged by the first defendant. The suit O. S. No. 79 of 1939 was withdrawn by Ramaswami Goundan and dismissed. It is observed that the suit was filed on the last day of limitation. We are not now concerned with the reason as to why the suit was withdrawn or dismissed."

We might here mention that O. S. No. 79 of 1939 was filed by the appellant's father to recover the money due in respect of the three-fourths share in the second mortgage and the half share in the third mortgage. To that suit, the present plaintiffs (respondents) were made defendants. They filed a written statement, Ex. D-3. In that written statement they pleaded that the sale taken by the appellant operated as a discharge of the claims put forward in that suit. After the matter went to trial and at the last moment the suit was withdrawn and, as the evidence shows, it was withdrawn for the reason that there was overwhelming evidence to show that the sale in favour of the appellant was really in discharge of the claims put forward by the father in that suit. In paragraph 9 of Ex. D-3, the present plaintiff stated thus with reference to the mortgages sued upon :

"As the suit mortgages have been quoted in the sale deed dated 21st April, 1927, as the aforesaid sale was one actually obtained by the plaintiff in the name of his undivided son, the sixth defendant, and as he has obtained possession of the lands in accordance with the sale deed and has been enjoying the profits of the lands for these 12 years, the suit mortgages have been discharged in fact."

We have therefore very good evidence in the shape of an admission made by the respondents in Ex. D-3 in support of the conclusion that the claims of the appellant's father under Exs. D-9 and D-6 were in fact discharged by the sale under Ex. D-7. There is therefore no substance in the argument that the second and third mortgages have not been fully discharged and we reject it.

The next argument is put forward with reference to the fourth mortgage. It is said that as there was a suit filed by the fourth mortgagee, a decree obtained and the property brought to sale and sold, the mortgage is no longer alive and is not available for the application of the doctrine of subrogation. We think that the mere fact that the fourth mortgage was sued upon and that preliminary and final decrees were passed on the said mortgage or that the properties were sold in execution of that decree is not a ground for negativing the right of subrogation. What is required is that the mortgage should have been discharged. It was discharged by payment of the amount advanced under the suit sale.

We next go to the question of consolidation on which an alternative claim is put forward by the appellant. The doctrine of consolidation has been recognised by the Judicial Committee in *Ramarayaningar* v. *Maharajah of Venkatagiri*[1]. Referring to sections 61 and 62 of the Transfer of Property Act, their Lordships laid down at page 190 :

"It is contended before this Board on behalf of the defendant (appellant) that the two deeds, Exs. A and I should be read together, as they form parts of one transaction, the lease being in the

1. (1926) 52 M.L.J. 338 : L.R. 54 I.A. 68 : I.L.R. 50 Mad. 180 (P.C.).

nature of machinery for the purpose of realising the interest due on the mortgage; further, that section 62 of the Transfer of Property Act has no application to the case as it applies only to a case of an usufructuary mortgage pure and simple, which Ex. A is not, as it contains covenants for payment both of principal and interest. The section which the appellant's counsel urges as being applicable to the facts of this case is section 61 of the Transfer of Property Act which enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same property.

Their Lordships are of opinion that these contentions on behalf of the appellant must prevail. A number of authorities on the sections of the Transfer of Property Act were cited which their Lordships have considered, but upon which they think it unnecessary to comment. In their Lordships' view section 62 of the Transfer of Property Act applies only to usufructuary mortgages pure and simple and is not in any way inconsistent with the provisions of section 61."

This decision is an authority for the proposition that the Transfer of Property Act of 1882 enacted by implication that a mortgagor seeking to redeem one mortgage shall not be entitled to do so without paying the sums due under a separate mortgage or charge if the latter relates to the same property. It is a statutory right that is given by the Act, though not expressly, that in cases where there are two encumbrances on the same property, the mortgagor is not entitled to redeem the one without redeeming the other. This decision is also an authority for the proposition that whether the other encumbrance is a mortgage or a charge, in either case, the mortgagor has to pay sums due thereunder before he can redeem the mortgage which he seeks to redeem—*see also* Fisher on Mortgages (7th edition, page 578)—" Securities may be of different natures, *e.g.*, an assignment of equitable personalty with a mortgage upon freeholds and leaseholds."

The next point is whether the change made by the Amending Act of 1929 which came into force on the 1st April, 1930, has altered the position. Mr. Krishnaswami Aiyar has presented different aspects to this question. One is that section 24 of Act XX of 1929 which amended section 61 of the Transfer of Property Act of 1882 took away the right of consolidation even in a case where the mortgages are on the same property. The old section and the new section may now be set out :

Section 61 *before amendment.*	*Section* 61 *as amended.*
A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him or by any person through whom he claims on property other than that comprised in the mortgage which he seeks to redeem.	A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

The words "on property other than that comprised in the mortgage which he seeks to redeem" have been omitted in the new section. Now whether the mortgages are on the same property or on different properties, there is no right of consolidation and the mortgagor may redeem any one mortgage or one or more mortgages, without redeeming the others. This result was reached by section 24 of Act XX of 1929 which runs thus :

" For section 61 of the said Act and the illustration thereto the following section shall be substituted, namely, 61 : A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together."

Section 63 of that Act (XX of 1929) enacts that certain sections in the Amending Act are not to operate retrospectively. Section 24 of the Amending Act is not included in this group of sections which are expressly stated to be not retrospective. The argument of Mr. Krishnaswami Aiyar is that, as section 24 is not included in that group of sections which are stated to be not retrospective, the other sections of the Amending Act are retrospective and that section 24 is therefore retrospective. There is much force in this argument; but this Court has held that the mere fact that a particular section of the Amending Act is not included in the group of sections which are declared to be not retrospective by section 63 of the Amending Act is not a ground for saying that that section is retrospective. The question arose with

reference to sections 92 and 53-A of the Transfer of Property Act. Both the sections have been amended by Act XX of 1929 and both of them are omitted from the group of sections which are declared to be not retrospective. Pressed with an argument like the one that is pressed upon us by Mr. Krishnaswmi Aiyar this Court held that the mere fact that a particular section of the Amending Act is not included in section 63 of that Act as not being retrospective in character does not lead to the conclusion that that section is retrospective in character—see *Kanakamma* v. *Krishnamma*[1]. The ordinary rule of interpretation is that vested rights under an existing statute are not to be taken away by an amending statute unless the latter is clearly retrospective in character. The question is whether the right which is claimed under the old Act is a vested right in property. If what is claimed is not a right or a vested right but only a privilege, then an alteration of the law will take away the privilege. Where a person had a license for two years coupled with an option to renew the license for another year, the Judicial Committee held that it was only a privilege and not a right and that no one has a vested right in a mere privilege. In such a case the amending legislation will prevail and the privilege can no longer be exercised. This was decided by the Judicial Committee in *Reynolds* v. *Attorney-General of Nova Scotia*[2]. After stating the facts, Lord Morris, delivering the judgment of the Committee, stated thus at page 243 :

> "When the appellants applied for the renewal for one year on August 21, 1889, the power of the Commissioner to grant such renewal was gone, as the section of the statute conferring it had been repealed. It has, however, been contended on the part of the appellants that the Act of 1889 ought not to be construed so as to have the effect of taking away their right under section 95 of Chapter VII. No doubt, the maxim "*Omnis nova constitutio futuris formam imponere debet non praeteritis*" has been applied to the extent that a new law ought to be construed so as to interfere as little as possible with vested rights, and in *Main* v. *Stark*[3], the Earl of Selborne says 'words not requiring a retrospective operation, so as to affect an existing status prejudicially, ought not to be so construed,' yet the result is that in all cases it is necessary to ascertain what the Legislature meant. In the present case the only existing license the appellants had when the amending statute passed was one for two years expiring in August, 1889. They had a privilege to get an extension for one year under section 95, but had no accrued right, and the object of the legislation of 1889 was to get rid of licenses and substitute leases."

In *Abbot* v. *Minister for Lands*[4], it was laid down that a mere right to take advantage of the provisions of a statute is not a right accrued. The relevant portion of the headnote runs thus :

> "The mere right, existing at the date of a repealing statute, to take advantage of provisions of the statute, repealed is not a 'right accrued' within the meaning of the usual saving clause."

The decision depended on the wording of the particular statute. In this case we are of opinion that the right of consolidation was not a mere right to take advantage of an existing statute when it was repealed but that it was an accrued right. The moment that one mortgagee gets in the right of other mortgagees or chargeholders the right of consolidation arises as decided by the Judicial Committee in *Ramarayaningar* v. *Maharaja of Venkatagiri*[5], already cited and it is a valuable vested right in property.

Yet another point raised by Mr. Krishnaswami Aiyar, is that the right claimed was one given by the common law of the land and not a right given by a statute and that the right given by the common law is not governed by the rule that vested rights are not to be taken away except when the amending legislation is clearly expressed to be retrospective. But we need not go into this question as we are of opinion that the right to consolidate, when the mortgages are on the same property is a statutory right given impliedly, as the Judicial Committee pointed out, by section 61 of the Transfer of Property Act, 1882.

It is then said that the law as to consolidation must be the one that exists on the date when the right consolidate is claimed in the suit. There does not seem to be any basis for this limitation. It is true no doubt that the occasion for putting

1. (1943) 1 M.L.J. 335 : I.L.R. (1943) Mad. 831 (F.B.).
2. (1896) A.C. 240.
3. (1890) 15 A.C. 388.
4. (1895) A.C. 425.
5. (1926) 52 M.L.J. 338 : L.R. 54 I.A. 68 : I.L.R. 50 Mad. 180 (P.C.).

forward the right of consolidation arises when the mortgagor seeks to redeem only one of the mortgages leaving the others unpaid and till then the mortgagee holds on to his securities and he is not disturbed. The moment he is disturbed he can claim that all the securities must be redeemed at one and the same time. It is true, that if a mortgagee who gets in all the mortgages and parts with some of them, he can no longer claim consolidation with respect to the mortgages which he has parted with, but that is because of the inherent nature of the right. It is only those mortgages which the person who claims consolidation has at the time of the suit that can be the subject of the claim for consolidation. A right of consolidation means a right to insist that all the mortgages which are united in one person must be redeemed all together or not at all. Therefore it presupposes the union of several mortgages in the person claiming consolidation and that at the time when he claims that right. But this does not mean that the law applicable to such cases is that which prevails on the date of the suit. That right accrued when all the mortgages became combined in him—and that was obviously in 1929 in this case—that is, before the Amending Act came into force.

The next argument is that the doctrine of consolidation is more in the nature of an obligation laid on the mortgagor rather than a right conferred upon the mortgagee. This again is merely expressing the right given to the mortgagee in terms of the liability imposed on the mortgagor. There is undoubtedly a right in the mortgagee to claim consolidation and it is a valuable right.

It is then said that a subrogee cannot acquire a right of consolidation. Mr. Krishnaswami Aiyar urges that even though a mortgagee as such or an assignee of the mortgagee can claim consolidation a mere subrogee is not entitled to consolidation. This argument is fallacious. Subrogation is in our opinion tantamount to an assignment in law. The rights of a subrogee are those of an assignee of the mortgagee and we see no reason to think that his position is not that of an assignee at law.

Then it was said that all the mortgages must be live mortgages, that is, they must not have been barred at the time of the suit. No decision has been brought to our notice laying down such a proposition. So far as the law of subrogation is concerned, several decisions of this Court have held that, to enable a defendant to use a mortgage as a shield by way of subrogation, the mortgage need not be alive on the date of the suit—see *Ananthanarayana* v. *Sivaramakrishnayya*[1] and *Venkataramana Reddi* v. *Rangiah Chetti*[2]. It is suggested that this rule does not apply to cases of consolidation. We see no reason to differentiate between the case of consolidation and the case of subrogation so far as this point is concerned. On the date when the right of consolidation arises, the several mortgages must have been live mortgages. Consolidation arises by the fact that several encumbrances became united in one person, and on the date when they so became united in one and the same person they must all have been live mortgages. To that extent we agree that the mortgages must have been alive ; but, if a mortgagee has a right to insist upon redemption of all the mortgages which have become united in him, he can hold on to the property and claim that the mortgagor, when redeeming the one, must redeem all ; and in such cases, there does not seem to be any reason or principle which necessitates all mortgages being alive on the date of the suit.

In the result, we reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court.

(This second appeal having been set down on 23rd January, 1946, to be mentioned the Court made the following Order :—

Time for payment 15th April, 1946.

K.S. ——— *Appeal allowed.*

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1. (1943) 1 M.L.J. 100. 2. (1921) 41 M.L.J. 399.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Sri Raja V. Sarvagnaya Kumara Krishna Yachendra Bahadur Varu, Rajah of Venkatagiri .. *Appellant**

v.

The Province of Madras represented by the District Collector of Nellore .. *Respondent.*

*Madras Proprietary Estates Village-Service Act (II of 1894), sections 17 and 27 (3)—Right to enfranchise service inams in zamindari—Scope and applicability of sections 17 and 27 (3)—*Res judicata*—Adjudication of claim on admission—Effect—Estoppel—Right to claim deduction in peishcush—Limitation—Specific Relief Act (I of 1877), section 42 Proviso—Suit for mere declaration against Government—Further relief not possible —Maintainability.*

In O. S. No. 10 of 1940, filed by the Zamindar of Venkatagiri against the Government of Madras, it was held by the District Judge that the Government was not "entitled to resume or assess to public revenue inams or lakhiraj lands (other than village service inams enfranchised by Government under the provisions of Act II of 1894) within the Venkatagiri zamindari or to any reversionary right in such lands." On appeal by the Government to the High Court and Privy Council, the Judicial Committee held that the jama was assessed on the whole estate inclusive of the lakhiraj and inam lands. Pending decision by the Privy Council, the Government had proceeded to implement the policy underlying the Act by enfranchising the village service inams, but after the decision of the Privy Council directed the cancellation of such enfranchisement. But the Zamindar, who took up the position that the decision of the Privy Council in no way affected the statutory power of the Government under the Act to enfranchise village service inams in proprietary estates at the time of their permanent settlement, and that the unreversed decision of the trial Court in the previous litigation regarding the right of the Government under the Act to enfranchise village service inams in the Venkatagiri estate was binding on both parties and precluded Government from reopening the question, filed O. S. No. 6 of 1934, for a declaration that the cancellation of the enfranchisement and the consequential acts were *ultra vires*. The suit was compromised and the order was whatever right, title or interest that the Government may possess in the village service inams in the Venkatagiri estate the Government was to assign to the Zamindar; the general rules in force applicable to village establishments shall replace the special rules newly introduced in the Venkatagiri zamindari; an additional sum was to be paid to the Government so long as Government continued to maintain the village establishments; in the event of the Government ceasing to do so to reassign to the Government whatever the Zamindar obtained from the Government under the compromise; and liberty was reserved to the Zamindar to claim by appropriate proceedings a reduction of the peishcush under section 27 (3), and to the Government to contest the claim if so advised. In a suit for adjudication of the claim so reserved the questions raised were (*i*) whether the Government had the right under section 17 of the Act to enfranchise the village service inams in the Venkatagiri zamindari notwithstanding that the right of resumption in respect of them was vested in the Zamindar; (*ii*) whether the Government is estopped by the judgment of the trial Court in O. S. No. 10 of 1910 from denying that it had such power; (*iii*) whether section 27 (3) is applicable to the facts of this case and whether the Zamindar was entitled to compensation by way of proportionate reduction of peishcush as provided therein; (*iv*) whether the suit is barred by limitation and not maintainable in view of the proviso to section 42 of the Specific Relief Act.

Held, (*i*) section 17 was designed to enable the Government to deal with inam lands held by the specified classes of village officers, only where such inams were subject to the reservation at the permanent settlement which give Government right to resume and assess them and as there was no such reservation here the Government had no power to enfranchise them under the section, with the result that the acts, proceedings and notifications of the Government purporting to enfranchise them were void and of no effect.

(*ii*) If the Zamindar sued for compensation for loss of his reversionary rights in the inams (assuming such a remedy to be open) the Government would be precluded from withdrawing from the position which it successfully maintained in the prior suit and obtained judgment upholding the right, albeit on the admission of the predecessor in interest of the opposite party. But as in the present case the whole basis of the claim of the Zamindar is founded on section 27 (3) the question depends upon whether section 27 (3) applies at all.

(*iii*) Section 27 (3) does not apply to the facts of the case as the village officers to whom the Act can be made applicable performed services of a public character and the proprietor could not resume the service tenure lands held by them and their rental value never figured in his balance sheet and his residuary rights in the inams though rights of property are rights of a shadowy character, and the legislature could not have intended to provide for a recurring annual compensation for their loss which is incurred once for all when the Government enfranchise such inams. Further as the inams were included only in the sense that they were made part of the assets on which payment of the permanent assessment was secured it seems impossible to apply the provision.

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* Appeal No. 294 of 1944. 1st March, 1946.

(iv) The right to sue for a declaration that a landlord is not entitled to collect an enhanced rent arises on each occasion when such rent is collected and as the same principle has to be applied here, whether it is Article 120 or Article 131 that applies, there is no bar of limitation.

(v) As further reliefs could not and need not be asked for in the case of a declaration against the Government, there is no bar to maintainability of the suit.

(vi) The doctrine of *res judicata* is founded on public policy and cannot be waived even by consent of the parties. Hence, it was not competent for the parties to agree by their compromise in O.S.No. 6 of 1934, that the judgment of the trial Court in O. S. No. 10 of 1910 should not operate as *res judicata*. The effect of the compromise in O. S. No. 6 of 1934 is that notwithstanding the reservation of liberty to the Zamindar to claim a deduction of peishcush under section 27 (3) the original enfranchisement by the Government is nullified and its subsequent cancellation confirmed; and it follows that there is no basis for the claim in this suit.

Secretary of State for India v. *Raja Sobhanadri Appa Rao*, (1937) 2 M.L.J. 240 : L.R. 64 I.A. 227 : I.L.R. 1937 Mad. 862 (P.C.) ; *Secretary of State* v. *Sri Raja Vasi Reddi*, (1929) 30 L.W. 129 ; *Hoystead* v. *The Commissioner of Taxation*, L.R. (1926) A.C. 155 and *Sriman Madabushi Achamma* v. *Gopichetti Narayanaswami Naidu*, (1909) 19 M.L.J. 734 : I.L.R. 33 Mad. 171, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Nellore, dated 31st December, 1943, and passed in O. S. No. 12 of 1941.

The Advocate-General (*K. Rajah Aiyar*), *K. Subba Rao* and *V. Venkatachari* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—The appellant is the proprietor of the zamindari of Venkatagiri, a permanently settled estate of considerable extent in the district of Nellore. Within the estate are numerous parcels of land granted as inams before the permanent settlement for various pious and charitable purposes or as remuneration for village offices in the estate. The Provincial Government, respondent herein, purported to "enfranchise" such of these inams as were annexed to certain classes of village offices in the estate and impose quit-rents thereon payable to Government, claiming to be entitled to do so under the provisions of the Madras Proprietary Estates' Village-Service Act, 1894 (hereinafter referred to as the Act). Though the enfranchisement was "cancelled" subsequently, the appellant, alleging that such "cancellation" was *ultra vires*, brought the suit in which this appeal arises against the Government for a declaration that he is entitled to have the *peishcush* or permanent assessment of the zamindari reduced in the manner provided for in sub-section (3) of section 27 of the Act. He also prayed for certain consequential reliefs which by subsequent amendment of the plaint were omitted for reasons to which reference will be made later.

The right of resuming or assessing to public revenue the inam lands in the estate which were granted before the permanent settlement has been a bone of contention between the parties for over a century, but it is not necessary for the purposes of this appeal to trace the antecedent history of the disputes further back than 1910 when the appellant's grandfather instituted a suit (O. S. No. 10 of 1910), in the District Court of Nellore for a declaration that he and not the Government was entitled to resume all inams situated within his zamindari whether held rent-free (*lakhiraj*) or on favourable rent, and for an injunction restraining the Government from dealing with them under the inam rules or otherwise. He claimed that under the permanent settlement concluded by the Government of the East India Company in 1802 with the then Zamindar the terms of which were embodied in a *sannad-i-milkeut istimrar* dated 24th August, 1802, the Government granted all the lands in the zamindari reserving only lands appropriated to the support of the Police Establishment besides the three heads of revenue, salt, sayer and spirituous liquors, but without any reservation of other *lakhiraj* lands and lands held on favourable rents such as was contemplated in section 4 of the Permanent Settlement Regulation (XXV of 1802). On the other hand, the Government contended that the provisions of the regulations were applicable to the permanent settlement of all zamindaries including Venkatagiri, that all *lakhiraj* lands as well as lands held on favourable quit-rents must accordingly be deemed to have been excluded from

the assets on which the permanent assessment was fixed with the result that the right of resuming such lands vested in the Government and that, in particular, the Government had, by virtue of the statutory power conferred by the Act, the right to enfranchise, by the imposition of quit-rent, the inams attached to those village offices in the appellant's estate to which that Act had been made applicable. On the general issue, the trial Court held that the Government did not reserve to itself the right to resume *lakhiraj* lands and lands bearing favourable quit-rents at the time of the permanent settlement of the Venkatagiri zamindari and was not entitled, either under the terms of the sannad or by virtue of Regulation XXV of 1802, to resume such lands, and that the Zamindar alone was entitled to the reversion of all such lands and had the right to resume or assess them to revenue. With reference to the special ground of claim put forward by the Government in respect of village-service inams, which was the subject of issue 17, the learned District Judge noted that the Zamindar did not press the contention raised in that issue and held that "the plaintiff is disentitled in consequence of the provisions of Act II of 1894, to object to the enfranchisement of village-service inam." Accordingly he made a decree dated 30th September, 1912, declaring that the Government was "not entitled to resume or assess to public revenue inams or *lakhiraj* lands (other than village-service inams enfranchised by Government under the provisions of Act II of 1894) within the Venkatagiri zamindari or to any reversionary right in such inams," and permanently restraining the Government and its officers from dealing with such inams under the inam rules. The Zamindar did not prefer any appeal in respect of the village-service inams but the Government, after unsuccessfully appealing to this Court, carried the matter to the Privy Council. In the meantime, acting on the decision of the trial Court which was thus allowed to become final so far as it related to the village-service inams in the estate, the Government proceeded to implement the policy underlying the Act by enfranchising such inams and substituting salaries for the village establishments, and issued notifications under S. 17 of the Act directing that the enfranchisement should take effect in the different groups of villages mentioned therein on the various specified dates during the years 1914 and 1915. On 15th July, 1921, the Privy Council rejected the appeal.

As their Lordships' judgment (reported in *Secretary of State* v. *Rajah of Venkatagiri*[1]) forms the principal foundation for the contentions of the parties in these proceedings, it is necessary to refer briefly to the conclusions recorded in that judgment. Their Lordships pointed out that at the time of the permanent settlement of proprietary estates in this Presidency two distinct policies were pursued, one with regard to the powerful zamindars who maintained large armies with whom settlement was essential on a separate basis; the other a measure of general assessment in accordance with the provisions of Regulation XXV of 1802. In the case of "the four western zamindars," *viz.*, Venkatagiri, Kalahasti, Bomrauzepalam and Sidapore which were held on condition of rendering military service to the ruling power, the settlement was effected "independently of the provisions of Regulation XXV of 1802" by fixing "a definite specific assessment on the whole zamindari irrespective of the particular assets derived from each particular unit of property." For Venkatagiri, the permanent assessment, *viz.*, 1,11,058 star pagodas, was arrived at by adding to the "established peishkush" of 21,673 star pagodas, which the Zamindar had been paying as a tribute to the Nawab of Arcot and which, by the treaties of 1792 and 1801 made between the East India Company and the Nawab, became payable to the company, the commuted value of the military service (of which the Zamindar was relieved), *viz.*, 98,327 star pagodas, and deducting 8,942 star pagodas for the loss of revenue arising from sayer, salt and spirituous liquors, which the company's Government reserved to itself. Their Lordships laid stress on the absence in the sannad granted to the Zamindar, of any reference to the *lakhiraj* lands within the zamindari, the only reservations being those contained in clause 5, and held that section 4 of the Regulation had no application to the zamindari, and that "both the assessment and the sannad were outside the Regu-

1. (1921) 41 M.L.J. 624: L.R. 48 I.A. 415: I.L.R. 44 Mad. 864 (P.C.).

lation." Their Lordships concluded by observing that "the jama was assessed on the whole estate inclusive of the *lakhiraj* and inam lands."

It will thus be seen that the decision proceeded on broad grounds of the principles and policy on which the permanent settlement of the "four western zamindaries" including Venkatagiri was effected and on the interpretation of the sannad issued to the Zamindar—grounds that are equally applicable to the village-service inams situated within the zamindari, although these inams did not form part of the subject-matter of the appeal before their Lordships which was concerned only with other classes of inams in the estate. This is accepted by both parties in these proceedings and it is, accordingly, common ground that village-service inams were also included in the estate granted to the Zamindar under the sannad, and that, in consequence of such inclusion, the reversionary right in such inams was vested in the Zamindar and not in the Government.

As a result of the decision, the Government reconsidered its position *vis a vis* the village-service inams in the Venkatagiri zamindari and, taking the view that no enfranchisement of such inams was legally possible as the right of reversion in respect of them was held to be in the Zamindar, the Government issued an order (G. O. No. 875 dated 12th June, 1925), directing the "cancellation" of the enfranchisement of such inams. By the same order it was also proposed that the Government should maintain only such village officers in the estate as were necessary for purposes of general administration and for magisterial, police and revenue work, leaving it to the Zamindar either to make his own arrangements for carrying on the work of his estate or, if he preferred to employ the same village establishment, to contribute the extra cost involved in maintaining the additional establishment that would be necessary to carry on the proprietor's work as well. The Zamindar to whom the proposals were communicated protested against the proposed changes. He urged that the Government having gone far in giving effect to the policy underlying the Act by actually enfranchising the village-service inams in the estate, abolishing the system of collecting *meras* and *russums* from the ryots for payment to the village officers as additional remuneration and substituting fixed salaries, a reverter to the old system would be fraught with serious consequences. He accordingly requested that the re-organised system of village service which had been introduced under the Act should be continued. The Government, however, paid no heed to this request and carried out their proposals by purporting to "cancel" the enfranchisement of the village-service inams and the previous notifications relating thereto and by framing revised rules under the Act whereby village officers were not required to perform the services which they had theretofore been rendering to the proprietor. This led to fresh litigation between the parties.

The Zamindar took up the position that the decision of the Privy Council in no way affected the statutory power of the Government under the Act to enfranchise village-service inams in proprietary estates even where such inams were included in the estates at the time of their permanent settlement and that the unreversed decision of the trial Court in the previous litigation regarding the right of the Government under the Act to enfranchise village-service inams in the Venkatagiri zamindari was binding on both the parties and precluded the Government from re-opening that question. He accordingly brought the suit O. S. No. 6 of 1934, in the Court of the Subordinate Judge of Nellore for a declaration that the acts, proceedings and notifications of the Government purporting to cancel the enfranchisement of the village-service inams and promulgate the revised rules regarding village officers were *ultra vires* and illegal, and that he was entitled to a proportionate reduction of the permanent assessment under section 27 (3) of the Act in consequence of the Government having enfranchised the service inams included in his estate at the permanent settlement. He also sought sundry other consequential reliefs to which it is unnecessary to refer in detail. The Government traversed the claim, maintaining that the action taken by it subsequent to the decision of the Privy Council was in accordance with and consequent on that decision, and that section 27 (3) of the Act had no application to the case. The suit, however, ended

in a compromise which was recorded by the Court and a decree was passed in accordance therewith on 20th October, 1937. The Government was to assign to the Zamindar "whatever right, title or interest that the Government may possess in the village service inams in the Venkatagiri estate" mentioned in the plaint schedule, withdraw the special rules applicable to village establishments then in force in the Venkatagiri Zamindari and apply the general rules previously in force; the Zamindar was to pay every year a sum of Rs. 14,436-2-0 by way of an addition to the peishcush payable on the zamindari so long as the Government continued to maintain the village establishments in the estate, and, in the event of the Government ceasing to do so, to reassign to the Government whatever rights the Zamindar obtained by assignment under the compromise; liberty, however, was reserved to the Zamindar to claim by appropriate proceedings a reduction of the peishcush under section 27 (3), and to the Government to contest the claim if so advised. It is for an adjudication of the claim thus reserved that the present suit has been brought.

Briefly, the appellant's case is that, notwithstanding the inclusion of the village service inams in his estate at the permanent settlement thereof, the Government had the statutory right under section 17 of the Act to enfranchise the said inams, and the Government having validly enfranchised the same and issued title deeds granting freehold rights in the properties to the inamdars, could not legally "cancel" such enfranchisement as it purported to do in 1925. Such cancellation was therefore void and inoperative and left the enfranchisement of the inams in full force. The appellant, having thus been deprived of the reversionary rights in such inams which had been included in the assets on which the peishkush was fixed was entitled to the compensation by way of proportionate reduction of the peishcush provided for by section 27 (3) of the Act. The appellant maintained that although the decision of the Privy Council conclusively established that all pre-settlement inams were included in his zamindari at the time of its permanent settlement, it did not in any way affect the Government's statutory power under section 17 of the Act to enfranchise the village-service inams in the estate. In any case, the Government, having sought and obtained a decision in its favour in the trial Court in O. S. No. 10 of 1910 as to the existence of such power was estopped from denying that it had such power.

On the other hand, the Government while admitting, in view of the Privy Council decision, that the right of reversion, in the village service inams in the Venkatagiri estate was in the Zamindar, averred that, for that very reason, the enfranchisement of such inams by the Government was *ultra vires* and illegal, and that its subsequent cancellation was therefore proper and valid. The right of reversion in respect of these inams always remained vested in the appellant or, at any rate, became revested in him in consequence of the compromise decree in O. S. No. 6 of 1934, and he was not entitled to any reduction of the permanent assessment payable on his zamindari. In any case, section 27 (3) of the Act on which the appellant based his claim was not applicable to the case as the peishcush was fixed at the permanent settlement without reference to the assets of the zamindari. The Government also pleaded that the suit was barred by limitation as well as by the proviso to section 42 of the Specific Relief Act, as the appellant, being able to seek further relief than a mere declaration of right, omitted to do so. Sundry objections as to the valuation of the suit and the court-fee paid thereon were also raised. It will thus be seen that the material facts are not in dispute, and the questions that fall to be decided are questions of law and interpretation.

The learned Subordinate Judge overruled the preliminary pleas put forward in bar of the suit. On the merits he held: (*a*) that the Government had power under section 17 of the Act to enfranchise the village service inams in the Venkatagiri zamindari, although such inams were not reserved by the Government at the permanent settlement, (*b*) that the Government was precluded from contending that they had no such power by reason of having successfully pleaded in O. S. No. 10 of 1910 that they had such power, (*c*) that the Government had no right to cancel

the enfranchisement thus validly effected, and (*d*) that the compromise decree in O. S. No. 6 of 1934 did not have the effect of nullifying the enfranchisement or of precluding the appellant from contending that the Government had power under section 17 to enfranchise the inams. The learned Judge, however, upheld the respondent's contention that section 27 (3) on which the appellant's whole claim in the suit was based was not applicable to the case, as the peishcush was fixed without reference to the assets of the zamindari and he accordingly dismissed the suit. All these points have been argued before us with ability and thoroughness by learned counsel on both sides. It may be mentioned here that in view of the decision of the Privy Council both parties accepted the position (1) that the pre-settlement village service inams in the Venkatagiri zamindari were not reserved by the Government at the permanent settlement with the result that the right to resume such inams was vested in the Zamindar and (2) that the peishcush payable on the zamindari was fixed without reference to the income derived from the properties included in the estate, or in the words of their Lordships, "irrespective of the particular assets derived from each particular unit of property within the estate." The argument before us proceeded on that footing.

The main questions for consideration are whether the Government had the right under section 17 of the Act to enfranchise the village service inams in the appellant's zamindari notwithstanding that the right of resumption in respect of them was vested in the Zamindar, and, if so, whether the appellant is entitled, by way of compensation for the loss of such right, to a proportionate reduction of the permanent assessment in the manner provided for in sub-section (3) of section 27. It must now be taken as settled that village service inams, which formed part of the emoluments of village officers charged with the performance of certain public duties were excluded as a general rule from the assets of permanently settled estates either as lakhiraj lands or lands paying only a favourable quit rent as provided in Regulation XXV of 1802. See *Secretary of State for India* v. *Raja Sobhanadri Appa Rao*[1]. Although the right of resuming these inams was thus reserved by the Government, the appointment and control of these officers was left largely in the hands of proprietors, and this led to lack of discipline and efficiency among certain classes of village-officers. With a view to bring these officers under more efficient control, the Government decided, on the one hand, to subject their appointment by the proprietors to the approval and confirmation of the Revenue Officers of the Government, and, on the other, to substitute a system of payment by fixed salaries in lieu of remuneration by means of service tenure lands, which, being thus no longer required to provide such emoluments, the Government took power to enfranchise by imposition of quit rents. To give effect to this policy, the Act was passed as an enabling measure which the Government was empowered by notification to extend in whole or in part to any proprietary estate within the Presidency and to any of the specified classes of village-offices. The power of enfranchisement was conferred by section 17 which, so far as material here reads thus :

> "If the remuneration of a village-office consists in whole or in part of lands or assignments of revenue payable in respect of lands, granted or continued in respect of or annexed to such village office by the State, the Government may enfranchise the said lands from the condition of service by the imposition of quit rent under the rules for the time being in force in respect of the enfranchisement of village service inams in villages not permanently settled or under such rules as the Government may lay down in this behalf; such enfranchisement shall take effect (from such date as the Government may notify) :
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> and provided, further, that any lands or emoluments derived from lands which may have been granted by the proprietor for the remuneration of village service and which are still so held or enjoyed may be resumed by the grantor or his representative."

The question is whether the village service inams in the Venkatagiri zamindari to which the Act has been extended were "granted or continued in respect of or annexed to the village offices by the State."

1. (1937) 2 M.L.J. 240 : L.R. 64 I.A. 227 : I.L.R. 1937 Mad. 862 (P.C.).

The learned Government Pleader broadly contended that the Government had no authority to enfranchise lands held in service-tenure unless such lands had been reserved and excluded at the time of the permanent settlement as provided in section 4 of Regulation XXV of 1802, the terms " granted " " continued " and " annexed " by the State implying that the tenure was held under the Government, so that it could resume the lands and terminate the tenure. In support of this contention he strongly relied on the decision of the Privy Council, in *Secretary of State for India* v. *Raja Sobhanadri Appa Rao*[1], already referred to. In that case the proprietors of certain permanently settled estates sued the Government to recover possession of service inams which the Government had purported to resume under section 17 of the Act, and the question arose whether the lands had been granted or continued in respect of or annexed to the village offices there in question by the State. Some of the lands were totally exempt from the payment of revenue while others were subject to quit rents. This Court held that the former class must be regarded as having been excluded from the permanent settlement as lakhiraj lands and therefore " continued " in respect of the offices by the State within the meaning of section 17, while the latter were held to fall outside the scope of the reservation under section 4 of the Regulation as not being lands paying ' only ' favourable quit-rents as they were also subject to liability for service, and, therefore, also outside the scope of section 17. On appeal, their Lordships held that the reservation under section 4 of the Regulation extended also to service inams paying quit rents to Government as the word ' only ' was not meant to exclude liability to service, and that accordingly these inams must also be treated as ' continued ' by the State and so enfranchisable by the Government. The importance of the decision for the purposes of the present case lies in the fact that both this Court and the Judicial Committee made reservation by the Government at the time of the permanent settlement the test of the inam having been " continued " by the State. In other words the Government's right to enfranchise village-service inams was considered to rest on their exclusion from the assets of the zamindari at the settlement. Their Lordships observed that the framers of section 17 must have contemplated that continuance would be proved by reference to the provisions of section 4 of the Permanent Settlement Regulation " on which so much is found to turn " and that the word " continued " was probably taken from that section " so that, assuming lands paying only favourable quit rents to be included in the reservation in section 4 of the Regulation, their Lordships are of opinion that continuance by the State has been proved in these cases. Whether they are so excluded from the Permanent Settlement is the important question." Reservation at the time of the Permanent Settlement was similarly regarded as the test of liability to enfranchisement under section 17 in *Secretary of State* v. *Sri Raja Vasi Reddi*[2], where Venkatasubba Rao, J., after referring to section 4 of the Regulation observed :

> "Thus from the exclusion springs the right of the Government either to continue or abolish, for, if these various articles were included in the Zamindari, what right could the Government thereafter exercise in respect of them?"

These decisions would seem to support the contention of the Government Pleader.

The learned Advocate-General appearing for the appellant drew attention to the observation at page 871 in *Secretary of State for India* v. *Raja Sobhanadri Appa Rao*[1] :

> "As in all these cases the village servants as part of their remuneration had been assigned the revenue payable in respect of the lands forming part of their remuneration as well as the lands themselves, and as such assignments can only have been by the State, it might appear that all such assignments of revenue must have been made and continued by the State within the meaning of the section, and that it empowered the Government to enfranchise."

and he submitted that, on that view, the inams now in question should be held to fall within section 17 as having been ' granted ' by the State. It seems to us, however, that the expressions " granted " and " annexed " by the State must be taken in the context not only as referring to the origin of the tenure, but as implying

1. (1937) 2 M.L.J. 240 : L.R. 64 I.A. 227 : I.L.R. 1937 Mad. 862 (P.C.)
2. (1929) 30 L.W. 129.

also the continuance of the tenure under the State at the time of enfranchisement. This view would be in harmony with the interpretation by their Lordships of the word "continued" and would, by restricting the application of the section to inams reserved at the permanent settlement, avoid the anomaly of the Government dealing with property granted to the Zamindar; for it must be remembered, as pointed out by their Lordships, that "enfranchisement consists in releasing the lands from service and renouncing the reversionary rights of the State and confirming the inam to the grantee his heirs and assigns to dispose of as they might think proper subject to the payment of a quit rent and also, in some cases of a pecuniary payment" (p. 869). How could the Government exercise such rights of property in lands forming part of the estate granted to the Zamindar under the permanent settlement as in the present case? It was said that if the power of enfranchisement under section 17 was intended to be restricted to inam lands reserved under the settlement, it would have been unnecessary to confer statutory power on the Government for the purpose, as the Government would have no difficulty, having the reversionary right in such inams, in enfranchising them. This argument overlooks that service inams are held on certain conditions of tenure, and the Government may well have thought that it was desirable, to avoid litigation, to take statutory power to enfranchise such inams without reference to the terms on which they were held, in order to give effect to their scheme of reorganization of village establishments in proprietary villages. It was also argued that the second proviso to the section which empowers the Zamindar to resume service inams granted by him or his predecessor having been construed in *Secretary of State for India* v. *Raja Sobhanadri Appa Rao*[1], as being applicable only to post-settlement grants, the body of the section must be understood as authorizing the Government to enfranchise all pre-settlement inams whether reserved or not. Otherwise, it was said, no one would have the right to resume such inams where they were not reserved. The argument is fallacious. Where such inams were not reserved but included in the estate at the settlement, the right of the Zamindar to resume where resumption has become possible, does not rest on the proviso but on the grant evidenced by his sannad. On the other hand, the proviso shows that the Legislature did not intend to expropriate proprietors of the right of resumption vested in them. It was finally urged that, whereas section 2 contemplated the application of the Act to "any estate," the construction suggested for the respondent would exclude from the purview of the Act Venkatagiri and other zamindaries similarly settled under special sannads and thus substantially defeat the object which the Legislature had in view. We see no force in this argument. The Act is an enabling one, and the scope of its application is to be determined by a notification issued by the Government extending the Act or "any portion thereof" to any particular estate. In passing such an Act, the Legislature may well have contemplated the application of any of its provisions only where the necessary or appropriate conditions for the application of that provision were present-for instance in the case of section 17 where the right to resume is vested in the Government. The general language of section 2, cannot, therefore, be taken as authorising the application of the Act so as to involve expropriation of the proprietors of their reversionary rights in the service inams included in their estates.

In our opinion, section 17 was designed to enable the Government to deal with inam lands held by the specified classes of village-officers only where such inams were subject to reservations at the permanent settlement which gave Government the right to resume and assess them, and, as it is common ground that the lands here in question were not so reserved, the Government had no power to enfranchise them under the section, with the result that the acts, proceedings and notifications of the Government purporting to enfranchise them were void and of no effect.

The question next arises whether the respondent is estopped by the judgment of the trial Court in O. S. No. 10 of 1910 from contending that the Government

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1. (1937) 2 M.L.J. 240 : L.R. 64 I.A. 227 : I.L.R. (1937) Mad. 862 (P.C.).

had no power under section 17 of the Act to enfranchise service inams in the appellant's estate. As has been stated, that decision was based on the concession made by the appellant's grandfather so far as village-service inams were concerned, and there was no adjudication by the Court on the merits of the Government's claim based upon the Act. But as pointed out in *Hoystead* v. *The Commissioner of Taxation*[1], estoppel by judgment extends also to matters of admission fundamental to the decision. The question there was whether in an assessment to land-tax upon the estate left by a testator to his six children on the terms contained in his will, the assessees were entitled to six deductions of a certain sum as "joint owners" of the estate or only to one deduction, and it was decided that they were entitled to six. The decision was based on a construction of the relevant provisions of the taxing statute relating to the assessment of "joint owners," it being admitted by the Commissioner of Taxation that the assessees were joint owners under their father's will. In the assessment for a subsequent year, however, the Commissioner sought to limit the deductions to one, contending that his admission in the previous proceeding that the assessees were "joint owners" of the testator's estate was erroneous in law. Their Lordships held, reversing the decision of the High Court of Australia, that the Commissioner was estopped by the judgment in the previous assessment proceeding. Lord Shaw, delivering the judgment of the Board, observed :

"In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact ; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

In regard to the service inams which the Government purported to enfranchise under colour of the Act, the learned District Judge held that the then Zamindar was "disentitled in consequence of the provisions of Act II of 1894 to object to the enfranchisement of village-service inams." That was the judicial answer to the Zamindar's objection raised in issue 17 in that suit, though the answer was given in consequence of the Zamindar "not now pressing the contention raised" in that issue. We consider that the respondent having claimed the right under the Act to enfranchise the village-service inams in the appellant's estate irrespective of their reservation and obtained judgment upholding the right, albeit on the admission of the appellant's predecessor, is estopped from contending that the Government had no such right.

There are, however, limits to the operation of the estoppel. If, for instance, the appellant had sued for compensation for loss of his reversionary right in the inams (assuming such a remedy to be open to the appellant in the circumstances of the case, as to which we express no opinion) the Government would undoubtedly be precluded from withdrawing from the position which it successfully maintained in the former suit. But the estoppel does not, in our opinion extend so as to prevent the respondent from placing before the Court what should be the proper construction of section 17, in so far as such construction is found to have a bearing on the true meaning and effect of section 27 (3) on which the appellant has founded his whole claim to relief in this suit. It was for that reason that we have considered and expressed our opinion on the merits of the difference between the parties in regard to the construction of section 17. This brings us to the consideration of the most important question in the appeal, *viz.*, whether section 27 (3) is applicable to the case.

Section 27 (so far as material) runs thus :

"on or after the date notified under provisions of this chapter—

(1) if in any estate the cost of village establishments was provided for by a reduction of the permanent assessment on the condition that the amount of such reduction should be devoted to paying the village establishments, it shall be lawful for the Government to require the proprietor to pay,

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1. L.R. (1926) A.C. 155.

along with the present permanent assessment such sum, not exceeding the amount of such reduction as represents the annual remuneration at the time of such reduction of the classes of village officers brought within the scope of this Act;

(2) Where the said cost of village establishments was provided for by a deduction from the assets of an estate before its permanent assessment was fixed, it shall be lawful for the Government to require the proprietor to pay, along with the present permanent assessment, a sum equal to that by which it would have been increased had no such deduction been made on account of the remuneration of the classes of village officers brought within the scope of this Act;

in either of the cases referred to in sub sections (1) and (2) the proprietor shall no longer be liable for the payment of such classes of village officers;

(3) where the cost of maintaining any office to which this Act has been extended under section 2, and which is in existence in an estate at the date upon which this Act is extended thereto was included in the assets upon which the permanent assessment of the estate was fixed, the said permanent assessment shall be reduced to the amount at which it would have been fixed had no such inclusion in the assets taken place."

Sub-section (3) is by no means a model of perspicuity in draftsmanship, but we do not share the difficulty felt by the learned Subordinate Judge in accepting the appellant's interpretation of the "cost of maintaining any office" being "included in the assets" on which the peishcush was fixed. If the full annual rental value of a parcel of land appropriated as emoluments of an office was taken into account for the purpose of increasing the peishcush payable on the estate the cost of maintaining that office could well be said to have been "included in the assets" upon which the permanent assessment was fixed. The difficulty, however, in the way of accepting the appellant's contention lies deeper.

The section is manifestly designed to provide for a readjustment of the pecuniary obligations of the Government and the proprietor consequent on the scheme of reorganization of village establishments in proprietary estates under which the Government assumed the responsibility of paying fixed salaries to certain village officers out of the provincial funds, relieving the proprietors of liability in that behalf. The first two sub-sections present no difficulty; for they contemplate and provide for cases where the cost of village establishments was provided for at the time of the permanent settlement by allowing, in the one case, a reduction of the peishcush *after* it was arrived at on the basis of the assets included in the estate, and in the other, a deduction from such assets *before* fixing the assessment on the balance. In either case, the peishcush is to be proportionately increased, as the proprietor is no longer to be liable for remunerating the village-officers concerned. It is worthy of note that in neither of these cases does the enfranchisement of village service inams enter into the adjustment. Does it enter into the adjustment provided for in sub-section (3)? The learned Advocate-General suggested that the sub-section was specifically designed to provide compensation to the proprietor where service inams included in a zamindari at the permanent settlement were enfranchised by the Government in exercise of its statutory power under section 17 and was thus complementary to the latter provision. Indeed, it was claimed that unless section 17 is construed as authorizing the Government to enfranchise even inams which were included in the zamindari, there would be no case to which sub-section (3) of section 27 could be applied. We cannot agree. An obvious case for its application would be where contributions levied from the ryots for the remuneration of village-officers had been taken into account in fixing the peishcush at the time of the permanent settlement. As such collections are prohibited under section 30 where the Act is brought into force, the Zamindar would be entitled to the reduction of the peishcush as provided for in sub-section (3) of section 27. We have already expressed our opinion that section 17, on its true construction, does not empower the Government to enfranchise village-service inams which were not reserved at the permanent settlement. If so, it must follow that section 27 (3) was not intended to deal with expropriatory enfranchisement under section 17.

Assuming however, that such enfranchisement is authorised by section 17, we find it difficult to accept the view that section 27 (3) was intended to provide compensation in such a case. Why should a recurring reduction of the peishcush be allowed as compensation for loss of an asset of no practical value to the Zamindar?

When the new scheme is introduced in a proprietary estate, the Government takes upon itself the responsibility of paying the village-officers in consideration of which it would, on the assumption made, get the quit-rents imposed on the enfranchised lands as an off-set against the new liability assumed by it. But how does the new scheme affect the proprietor's financial position? He was under an obligation to maintain the village-establishment before the Act was extended to his estate. As the village-officers to whom the Act can be made applicable performed services of a public character, the proprietor could not resume the service tenure lands held by them. Their rental value never figured in his balance-sheet. No doubt the reversionary rights in the inams are rights of property. But they are rights of such shadowy character in the case of inams held by public officers whom the Zamindar was bound to maintain that it is difficult to suppose that the Legislature intended to provide for a recurring annual compensation for their loss which, such as it is, is incurred once for all when the Government enfranchises such inams. For all these reasons we are inclined to think that section 27 (3) was not intended to provide compensation for enfranchisement of service inams by the Government under section 17.

There is a still serious difficulty in applying section 27 (3) to the present case. However anomalous may be the result, as indicated above, of applying section 27 (3) to inams included in the zamindari but enfranchised by the Government under section 17 (assuming such enfranchisement to be authorised by that provision) it must be admitted that the language of section 27 (3) is apt to cover a case where the inams were included in the assets in the sense that the rental value of the lands were taken into account for the purpose of increasing the peishcush. But where, as in the present case, the inams were included (according to both parties) only in the sense that they were made part of the assets on which the payment of the permanent assessment was secured, it seems impossible to apply that provision. Such a case does not fit into the pattern of adjustment provided for therein. Though the expression "included in the assets upon which the permanent assessment of the estate was fixed" might, if it stood alone, mean inclusion in either of the senses indicated above, reading it in the context of the whole sub-section, particularly with the sentence immediately following, we think that it can only mean inclusion in the sense first mentioned, that is to say, that the rental value of the inam was taken into account for the purpose of increasing the peishcush. As we have already pointed out, the permanent assessment of the Venkatagiri and kindred zamindaries was fixed, under their special sannads, without reference to the assets comprised in them, by simply adding to the "established peishcush," which was only a fixed tribute, the commuted value of the military service which those Zamindars had theretofore been, but were no longer to be, liable to render. We are of opinion that section 27 (3) cannot be applied to such special cases, even assuming, for the purpose of argument, that section 17 authorised the Government to enfranchise service inams which were not reserved at the permanent settlement and that section 27 (3) was intended to provide for compensation generally for such expropriatory enfranchisements.

Reliance was placed on behalf of the appellant on an observation of Ramesam, *J.*, in *Secretary of State* v. *Sri Raja Vasi Reddi*[1], referred to already where the learned Judge, in repelling an argument based on section 27 (3) that village-service inams must be deemed to have been included even in estates settled under Regulation XXV of 1802, remarked that the provision might be explained with reference to the settlement of the Venkatagiri and kindred zamindaries under special sannads which did not follow the policy of the Regulation and included the village-officer's emoluments. It would be less than fair to the learned Judge to regard a remark of somewhat doubtful import made in passing as expressing his considered view on the point with which we have to deal.

There remains for consideration the question as to the effect of the compromise decree in O. S. No. 6 of 1934 on the points in controversy here. The learned Govern-

1. (1929) 30 L.W. 129.

ment Pleader claims that two results followed from that decree; first, that if there arose any estoppel from the judgment of the trial Court in O. S. No. 10 of 1910 as to the Government's power under the Act to enfranchise inams included in the Venkatagiri zamindari it was destroyed and the matter was set at large; and secondly, that, notwithstanding the reservation of liberty to the appellant to claim a reduction of peishcush under section 27 (3) the original enfranchisement by the Government was nullified and its subsequent cancellation in 1928, was affirmed, with the result that there is no basis left for the present suit.

We are unable to accept the first of these suggestions. Though the doctrine of *res judicata* is often treated as a branch of the law of estoppel, it is really founded on the public policy of putting an end to all litigation in regard to the same matter or, in the words of Lord Shaw in the case above referred to, "of setting to rest rights of litigants," and cannot be waived even by the consent of the parties. It was not therefore competent for the parties to agree by their compromise in O. S. No. 6 of 1934 that the judgment of the trial Court in O.S. No. 10 of 1910 should not operate as *res judicata*. Nor do we find in the terms of the compromise any indication that they intended to do so. There is, however, more force in the second contention. It will be seen from the material provisions of the compromise which we have already summarised that the parties agreed to restore the *status quo*, so far as the service inams were concerned, byproviding that whatever right, title or interest that the Government might possess in the village service inams which they had purported to enfranchise should be assigned to the Zamindar subject to a condition of re-assignment in case the Government ceased to maintain the village establishments in the zamindari. It is not suggested that this event has happened and re-assignment has been made. If the appellant has thus reacquired whatever right the Government affected to acquire in village service inams in the estate by the enfranchisement proceedings, it is difficult to see how any claim for a reduction of the permanent assessment could be founded on section 27 (3). If the appellant has sustained any loss or damage by reason of the Government's acts and proceedings or on account of any complications arising out of such acts and proceedings, the appellant may have a remedy against the Government under the ordinary law (as to which we express no opinion), but such loss or damage would afford no ground for the special form of relief by way of abatement of the annual peishcush provided for in section 27 (3). It was said that the provision in the compromise for an annual payment of Rs. 14,436-2-0 in addition to the peishcush practically nullified the effect of the assignment by the Government of their right, title or interest in the inams, as the said sum represented the total of the quit-rents which the Government had imposed on the lands at the time of their enfranchisement, so that the position was left substantially as it was before. The suggestion, however, overlooks that the Government undertook liability under the compromise to maintain the village officers in question on the basis of the old rules under which the officers performed various duties to the zamindar, and the Government was thus entitled to stipulate for a contribution from the Zamindar for the purpose. That the contribution happened to be fixed at the same amount as the total of the quit-rents imposed on the lands in respect of which the Government assigned their right, title and interest to the Zamindar under the compromise can make no difference to the legal effect of the transaction.

The preliminary pleas raised in bar of the suit can be disposed of in a few words. The learned Subordinate Judge has held that the suit was not barred by limitation, applying Article 131 of the Limitation Act. That article provides a period of twelve years for a suit to "enforce a periodically recurring right" the period commencing from "when the plaintiff is first refused the enjoyment of the right." It is not disputed for the respondent that if that article is applicable to the case, the suit would be well within time, but it is urged by the learned Government pleader that the article is not applicable as the appellant claims not a "recurring" right but a deduction which if allowed in this suit would once for all fix his liability at a reduced sum. He suggests that the residuary Article 120 is applicable to the case, and as the right to sue for a declaration accrued at least on 9th August,

1934, when the Government filed the written statement in O. S. No. 6 of 1934, denying the appellant's right to a reduction of the peishcush, the suit brought more than six years later, on 20th December, 1940, is barred. It is unnecessary to consider the applicability of Article 131 to the present case for, even if Article 120 is applied as suggested for the respondent, the suit would be in time. This Court has held in *Sriman Madabushi Achamma* v. *Gopisetti Narayanaswami Naidu*[1], that the right to sue for a declaration that a landlord is not entitled to collect an enhanced rent arises on each occasion when such rent is collected. The same principle must apply here. It is not denied that the Government has been collecting every year peishcush at the original rate without allowing the deduction claimed. In such circumstances there can be no bar of limitation.

As regards the maintainability of the suit for mere declaratory relief, it is to be observed that the plaint as originally filed prayed also for the appointment of a Commissioner for ascertaining the reduction allowable under section 27 (3) and for an injunction restraining the Government from collecting any sum in excess of the peishcush thus reduced. These prayers were, as stated already, subsequently deleted by amendment of the plaint. The prayer for appointment of a Commissioner is said to have been dropped in view of section 33 of the Act and section 58 of the Madras Revenue Recovery Act (II of 1864), the effect of which is to bar the jurisdiction of Civil Courts to decide any question regarding payment under section 27 of the Act or land revenue payable to Government. The appellant contends that he was not thus in a position to seek further relief by way of ascertainment of the amount of reduction allowable to him under section 27 (3). Nor could he ask, before the peishcush was actually reduced, for any injunction to restrain the Government from collecting it at the usual rate. Furthermore, it was not necessary for the appellant to ask for an injunction against the Government as a declaration of the appellant's right by the Court was sure to be respected and carried out. We accept these contentions and hold that the suit is not barred under the proviso to section 42 of the Specific Relief Act.

In the result, the appeal fails and is dismissed with costs.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Governor-General of India in Council, represented by the Secretary in charge of Railways, New Delhi .. *Petitioner**

v.

U. Raghunandan Shenoy .. *Respondent.*

Civil Procedure Code (*V of* 1908), *section* 80 *and Order VII*, *rule* 11 (d)—*Suit for damages against a Railway Company—Taking over of Railways by Government of India—Amendment of plaint by addition of Governor-General in Council as a party to suit—Notice to Governor-General in Council under section* 80, *Civil Procedure Code, essential for maintainability of suit.*

On the 6th June, 1944, the respondent in this petition sued the South Indian Railway Company Limited, for damages for short delivery of goods consigned to him. But on the 1st of April 1944, the Government of India had taken over the South Indian Railway, and relief, if at all, could only be granted against the Governor-General of India in Council. The respondent applied for leave to amend his plaint by adding the Governor-General of India in Council as the second defendant. His application was granted but he gave no notice under section 80, Civil Procedure Code, to the Governor-General in Council. On a contention that the suit did not lie in the absence of such notice,

Held, that the suit was not maintainable without notice being served upon the Governor-General in Council under section 80 of Civil Procedure Code.

Governor-General of India in Council v. *Krishnaswami Pillai*, Appeal No. 558 of 1944, followed.

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1. (1909) 19 M.L.J. 734 : I.L.R. 33 Mad. 171.

* C. R. P. No. 1099 of 1945. 19th March, 1946.

Great Indian Peninsular Railway Co. v. *Sreeramulu*, A.I.R. 1928 Mad. 599, overruled.

Held also, Order VII, rule 11 (*d*) of the Civil Procedure Code applies to a case where the suit appears from the statements in the plaint to be barred by law and cannot apply to a case like this.

Jagadishchandra Deo Dhabal Deb v. *Debendraprasad Bagchi*, (1930) I.L.R. 58 Cal. 850, distinguished.

Petition under section 25 of Act XI of 1887, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Mangalore, dated 26th March, 1945 in S.C.S. No. 183 of 1944.

S.S. Ramachandra Aiyar for Petitioner.

M.L. Nayak for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The petitioner in this case is the Governor-General of India in Council. On the 6th June, 1944 the respondent instituted in the Court of the District Munsiff of Mangalore a suit for damages for short delivery of goods consigned to him from Calicut by the South Indian Railway Company Ltd. On the 1st April, 1944 the Government of India took over the South Indian Railway and relief could then only be granted against the Governor-General of India in Council. The respondent applied for leave to amend his plaint by adding the Governor-General of India in Council as the second defendant, and his application was granted ; but he gave no notice under section 80 of the Civil Procedure Code. Having been added as a party, the Governor-General of India in Council contended that the suit did not lie because the requisite notice had not been given. This objection was overruled by the District Munsiff who on the authority of the judgment of Devadoss, J., in *Great Indian Peninsular Railway Co.* v. *Sreeramulu*[1], held that notice was not necessary in the circumstances.

The present suit is a small cause action and the petition now before us has been filed under section 25 of the Provincial Small Cause Courts Act. In the first place the petition came before Happell, J., who doubted the correctness of the judgment in the *Great Indian Peninsular Railway Co.* v. *Sreeramulu*[1]. Consequently he referred the petition to a Bench for decision.

We agree with the learned Judge that the decision in *Great Indian Peninsular Railway Co.* v. *Sreeramulu*[1], is erroneous. The suit could not be maintained without notice being served upon the petitioner under section 80 of the Code of Civil Procedure. The judgment of this Court in *Governor-General in Council* v. *Krishnaswami Pillai*[2], governs this case and the decision in *Great Indian Peninsular Railwar Railway Co.* v. *Sreeramulu*[1] must be overruled.

The learned advocate for the respondent has suggested that instead of this Court dismissing the suit, it should direct that the plaint be rejected under Order VII, rule 11 (*d*) and in this connection he has referred to observations made in *Jagadischandra Deo Dhabal Deb* v. *Debendraprasad Bagchi*[3]. The facts there were entirely different from the facts in the present case and that judgment has no application. We are not able to adopt the course suggested on behalf of the respondent because the plaint was in proper order when it was presented. Order VII, rule 11 (*d*) applies to a case where the suit appears from the statements in the plaint to be barred by law, which is not the position here.

In these circumstances, the only order which the Court can pass is an order dismissing the suit with costs plus the costs of the present petition and this is the order which we make.

K.C. *Suit dismissed.*

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1. A.I.R. 1928 Mad. 599.
2. Appeal No. 558 of 1944.
3. (1930) I.L.R. 58 Cal. 850.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE LAKSHMANA RAO.

The Indo Union Assurance Co., Limited .. *Appellant**

v.

T. Srinivasan. ..*Respondent.*

Principal and agent and master and servant—Relationship—Distinction between—Tests—Wrongful termination—Damages—Right to.

There is a difference between the relationship of master and servant and that of principal and agent. A principal has the right to direct what work the agent has to do, but a master has the further right to direct how the work is to be done. An agent would be entitled to damages in the event of the agency being wrongly terminated only if he had been successful in his agency.

Appeal against the judgment of the Hon'ble Mr. Justice Kunhi Raman, dated 26th April, 1945 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.S. No. 267 of 1944.

N. V. B. Sankara Rao and *G. Vasanta Pai* for Appellant.

N. Panchapakesa Aiyar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is a limited liability company which was formed to carry on business in life insurance. Its business was not a prosperous one and at the end of 1943 it was taken over by the Prithvi Insurance Company Limited, since when its business has been run as a "closed one" which means that new policies are not being issued.

On the 4th August 1941, the appellant engaged the respondent to act as its "Field Superintendent" for a period of ten years. This merely meant that he was to canvass for policies on behalf of the appellant with the right to appoint persons to assist him but to be remunerated by him out of his own pocket. His own remuneration was to be a commission of 75 per cent. on the first year's premium income and 10 per cent. on premiums paid by way of renewal. Should the business introduced by him in any one year fall short of Rs. 2,00,000, the rates of commission on Rs. 1,50,000 were to be 70 per cent. and 8¾ per cent. respectively. If the business did not amount to more than Rs. 1,00,000, the rates of commission were to be 65 per cent. and 7½ per cent. respectively. In addition to the commission the respondent was to be given a "consolidated allowance" of Rs. 75 per mensem, payable in advance on the first of each month. This allowance was not by way of salary. According to the respondent's evidence it was paid to him for expenses incurred for meeting agents, treating them and going about. It was anticipated that his monthly expenses in this connection would be Rs. 75. The contract further provided that he should be paid on the first of each month Rs. 100 as an advance against the commission earned by him. The respondent was left to conduct his canvassing as he chose. He admits that in this respect the company had no control over him.

The respondent appointed several persons as his sub-agents, but they introduced very little new business to the plaintiff. Including the respondent's own efforts only seventeen policies were secured, aggregating Rs. 26,000. The respondent was entitled by way of commission to the sum of Rs. 369-5-0. By the 30th November, 1941 he had drawn Rs. 536-8-0 as commission in advance. The appellant's general manager was one K. S. Ramamurthi with whom the respondent was on very friendly terms until the beginning of December, 1941, when they fell out. On the 1st December, 1941 the general manager sent a statement of account to the respondent showing that he was indebted to the company in the sum of Rs. 1,217-15-0 after allowing for the commission due to him. In this statement the respondent

* O. S. No. 30 of 1945. 27th March, 1946.

was debited with advances which the company had paid to his sub-agents and to one N. S. Mani who had not been engaged by him. The respondent protested, but the general manager maintained that the advances had been paid with the respondent's consent. It is said that the respondent never put his foot inside the appellant's office after the middle of December, 1941 and that no business was done by him or by his sub-agents beyond the business to which reference has already been made. It should be mentioned that most of those policies lapsed in 1942.

On the 20th November, 1944 the respondent filed on the Original Side of this Court the suit which has given rise to the appeal. He alleged that the appellant had broken its contract with him and he claimed the sum of Rs. 10,000 by way of damages. He maintained that he would have earned this amount if he had been allowed to continue as Field Superintendent for the unexpired portion of the ten years. He alleged that the general manager had been guilty of sharp practice and that he had done all that was incumbent upon him to do.

The suit was tried by Kunhi Raman, J., who held that the respondent had not substantiated his charge of sharp practice on the part of the general manager; but he considered that the appellant had broken the contract because it had insisted on the respondent agreeing to a statement of account in which he had been wrongly debited with advances made by the appellant to his sub-agents. The learned Judge found that the plaintiff was entitled to a decree for damages in the sum of Rs. 3,000 on the footing that the allowance of Rs. 75 per mensem was in fact salary. He held the date of breach to be the 1st January, 1942 when the appellant refused to pay him the allowance for that month. The sum of Rs. 3,000 represents Rs. 75 per mensem for forty months by which time the respondent had obtained another appointment. The appeal is from this decision. The appellant says that the contract was not one of service but of agency and the learned Judge erred in law in treating the allowance of Rs. 75 per mensem as salary.

We consider that the appeal is well founded. The contract was certainly not one between master and servant but one between principal and agent, and therefore damages cannot be granted on the basis of the relationship of master and servant. The difference between the relationship of master and servant and that of principal and agent is stated in Halsbury's Laws of England[1] to be this:

> "A principal has the right to direct what work the agent has to do; but a master has the further right to direct how the work is to be done."

As we have indicated, the appellant had no right to direct how the respondent should do his work.

As the Rs. 75 was not salary, but merely an allowance to be paid to the respondent to meet the expenses incurred by him when carrying out his duties as an agent of the appellant, it is obvious that it cannot be made the basis of assessment of damages for a breach of the contract in suit. We are not satisfied that the appellant was in breach. The correspondence indicates that the company was willing to continue to employ the respondent. But assuming that the learned Judge was right in holding the appellant to be in breach, the respondent must show that he has suffered damage. The learned Judge held that the appellant was under no obligation to accept policies procured by the respondent and therefore future commission could not be regarded as a basis for assessing damages. If the respondent had been successful in his agency, he would certainly be entitled to damages in the event of the agency being wrongly terminated, but he was not successful. We have said sufficient to indicate that he did practically no work, that he introduced very little business to the appellant, that the little business which he did introduce was of a very unsatisfactory nature and that in respect of this business he has been paid all that is due to him. The respondent has proved no damage and therefore in any event he is not entitled to a decree.

The appeal is allowed with costs here and below.

K.S. *Appeal allowed.*

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1. Hailsham Edition, Vol. 22, Page 113.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE RAJAMANNAR.

Gangadara Ayyar and others. .. *Petitioners**

v.

Subramania Sastrigal and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 110—Decree in respect of 6 out of 11 items claimed valued at more than Rs. 10,000—Appeal by defendant against the decree and cross-objections by plaintiff in regard to 4 out of 5 items disallowed—Dismissal of appeal and allowing of cross-objections—Value of items allowed less than Rs. 10,000—No question of law involved—Leave to appeal to Privy Council by defendants as against the decree in regard to all the 10 items—Competency—Decree of High Court one of variation and not of affirmance—Certificate to issue as of right.

Plaintiff the reversioner to the estate of *S* claiming to be entitled to all the 11 items of property of *S* valued at Rs. 31, 304 sued for a declaration that they belonged to *S* and that a settlement deed executed by *S*'s mother in respect of them was void. The trial Court gave the plaintiff a declaration in respect of 6 out of the 11 items of property claimed valued at Rs. 21,214. The defendants appealed to the High Court and the plaintiff filed a memorandum of cross-objections in which he said that the subordinate Judge should have declared him to be entitled to 4 more of the disallowed 5 items. The value of these 4 items was Rs. 9,190. The appeal was dismissed while the cross-objections were allowed. The defendants wanted to appeal to the Privy Council in respect of all the 10 items. On an objection by the plaintiff that as there were concurrent findings so far as 6 items of the property are concerned, the defendants could only appeal with regard to the items awarded by the High Court in appeal and they in themselves did not fulfil the requirements of the Civil Procedure Code with regard to value, there being no question of law involved,

Held, that the petitioners wish to challenge in the appeal to the Privy Council the validity of the plaintiff's claim with regard to 10 out of 11 items of property and the High Court's decree varied the decree in respect of four of the items. This being a decree of variation and not of affirmance, the petitioners are entitled as of right to a certificate under the provisions of section 110, Civil Procedure Code.

Case law discussed. *Ramanathan Chetty* v. *Subramanian Chetty* (1926) 51 M.L.J. 295 *Overruled.*

Petition under sections 109 and 110 and Order 45, rules 2 and 3 of the Code of Civil Procedure, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioners herein to appeal to His Majesty in Council against the judgment and decree of the High Court in App. No. 134 of 1943 (O.S. No. 86 of 1941 on the file of the Court of the Subordinate Judge of Trichinopoly.).

K. P. Ramakrishna Aiyar for Petitioners.

S. Amudachari, S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Respondents.

The Order of the Court was delivered by

The Chief Justice.—The petitioners seek a certificate permitting an appeal to His Majesty in Council. They were the second, third and fourth defendants in the suit. The plaintiff (the first respondent) sued for a declaration that the eleven items of property described in the schedules annexed to his plaint belonged to the the estate of one Sundaram Ayyar, who died on the 14th September, 1937 and that a deed of settlement executed by Sundaram Ayyar's mother on the 3rd November, 1938 in respect of these properties was void. The plaintiff was the reversioner to the estate and he claimed to be entitled to all the properties. The trial Court gave him a declaration in respect of six of the eleven items of property but dismissed the rest of the claim. The petitioners appealed to this Court on the ground that the trial Court had erred in giving the plaintiff a declaration in respect of the six items. The plaintiff filed a memorandum of cross objections in which he said that the Subordinate Judge should have declared him to be entitled to four of the remaining five items. The appeal was dismissed, but the memorandum of cross objections was allowed. The petitioners wish to appeal to the

* C.M.P. No. 1064 of 1945. 26th March, 1946.

Privy Council in respect of all the ten properties awarded to the plaintiff. In the trial Court the total value of the eleven properties in suit was stated to be Rs. Rs. 31,304. The value of the six properties in respect of which the Subordinate Judge gave the plaintiff a decree was Rs. 21,214. The value of the four properties referred to in the memorandum of cross objections was Rs. 9,190.

The application is opposed by the plaintiff. He says that as there were concurrent findings so far as six of the properties are concerned, the petitioners can only appeal with regard to the four items awarded to the plaintiff by this Court on appeal and that they in themselves do not fulfil the requirements of the Code of Civil Procedure with regard to value. The petitioners say that the value of the four items is immaterial, because the subject-matter of the proposed appeal will be the ten items of property in respect of which the plaintiff has succeeded and their value is and has been at all material times far in excess of Rs. 10,000. The application has been placed before a Full Bench because there is a conflict of authority in this Court on the question whether there is a right of appeal in circumstances such as we have here.

Appeals to the Privy Council are governed by the provisions of sections 109 and 110 of the Code of Civil Procedure. Where the case fulfils the requirements of the Code with regard to value, a party has a right of appeal if the decree of the appellate Court varies the decree of the trial Court. Where the appellate Court affirms the decision of the Court below, an appeal lies only when it involves some substantial question of law. In this case it is admitted that there is no substantial question of law. Undoubtedly the decree of this Court varied the decree of the trial Court in an important respect, because it gave four more items of property to the plaintiff.

Before turning to the decisions of this Court which have been quoted in argument, it is necessary to refer to the judgment of the Judicial Committee in *Annapurnabai* v. *Ruprao*,[1] as it is referred to in many of the reported cases. There the plaintiff claimed to be entitled as an adopted son to property valued at more than Rs. 10,000. One of the defendants, the widow of the alleged adoptive father, denied the adoption and claimed to be entitled to Rs. 3000 per annum by way of maintenance. The trial Court held that the plaintiff had substantiated his plea of adoption and gave the widow maintenance at the rate of Rs. 800 per annum, which was charged upon the estate. On appeal by her the decree of the trial Court in so far as it concerned the adoption was cofirmed, but the rate of maintenance was varied. Instead of Rs. 800 per annum the widow was awarded Rs. 1,200 per annum. She and a defendant who had also claimed, but unsuccessfully, to be an adopted son wished to appeal to His Majesty in Council. The appellate Court refused leave and the petitioners applied to the Judicial Committee for special leave, at the same time intimating that they did not propose to question the concurrent findings that the plaintiff was the adopted son. Their Lordships granted the petitioners special leave. In delivering the judgment of the Board, Lord Dunedin said that the contention of their counsel that they were entitled to leave by virtue of the provisions of section 110 of the Code was correct. They had a right of appeal. Lord Dunedin added that the petitioners' chance of success was not material to their application. As the petitioners accepted the finding with regard to the plaintiff's adoption, the special leave given was limited to the question of maintenance. There is here a pronouncement of the Judicial Committee that where there is a variance of the decree passed by the trial Court, the party affected thereby is entitled as of right to a certificate subject, of course, to the requirements of the Code being fulfilled with regard to value.

There are two decisions of this Court which support the petitioners' application for leave to appeal. They are *Shunmuga Sundara Mudaliar* v. *Ratnavelu Mudaliar*[2], and *Perichiappa Chettiar* v. *Nachiappan*[3]. In the former case the plaintiff sued for

1. (1924) L.R. 51 I.A. 319 : I.L.R. 51 Cal. 969 (P.C.).
2. (1928) 56 M.L.J. 476 : I.L.R. 52 Mad. 521.
3. (1930) 35 L.W. 206.

a general account against a trustee alleging specific instances of malversation. The trial Court held that only two of the eight charges had been proved. The value of the account was stated to be Rs. 14,458. The two charges in respect of which the plaintiff succeeded represented Rs. 7000. The defendants appealed in respect of the two charges which had been proved and the plaintiff filed a memorandum of cross objections relating to the other six charges. This Court dismissed the suit in its entirety on the ground that accounts had been rendered and had been suppressed and, therefore, it did not consider the appeal or the memorandum of objections in detail. The plaintiff applied for leave to appeal to the Privy Council. The application was opposed on the ground that the case did not fulfil the requirements of the Code with regard to value, because the appellate decree had in effect confirmed the trial Court's decree with regard to two of the charges and the remaining six charges represented less than Rs. 10,000. Phillips and Odgers, JJ., held that the subject matter of both the appeal and the memorandum of cross objections was the same, namely, the liability to account, and the decree of the High Court could not be construed as embodying two distinct decrees. There was a single decree in respect of a single subject matter and it did not affirm the decree of the first Court within the meaning of section 110 of the Code of Civil Procedure.

In *Perichiappa Chettiar* v. *Nachiappan*[1], a similar decisin was given by Reilly and Ananthakrishna Aiyar, JJ. That was a suit for accounts against an agent. The plaintiff valued his relief at Rs. 40,000. The trial Court gave him a decree for Rs. 5,682. The defendant appealed to the High Court and the plaintiff preferred a memorandum of cross objections, claiming a decree for a further sum of Rs. 20,000. This Court allowed the defendant's appeal in part and reduced the amount decreed by the trial Court by some Rs. 4,000. It allowed the memorandum of cross objections to the extent of only Rs. 150. On an application by the plaintiff for leave to appeal to His Majesty in Council it was held that this Court's decree had varied the decree of the trial Court to his prejudice and as the subject-matter of the suit in the trial Court and in the appeal to the Privy Council was upwards of Rs. 10,000, he was entitled to a certificate.

The decisions of this Court which are relied upon by the other side are those given in *Ramanathan Chetti* v. *Subramanian Chetti*[2], *Venkitaswami* v. *Sekkutti*[3], *Velayya* v. *H. R. E. Board, Madras*[4], and *Chockalingam Chetti* v. *Official Assignee, Madras*[5].

Ramanathan Chetti v. *Subramanian Chetti*[2], was also decided by Phillips and Odgers, JJ., but two years before they decided *Shanmuga Sundara Mudaliar* v. *Ratnavelu Mudaliar*[6]. In *Ramanathan Chetti* v. *Subramanian Chetti*[2] the appeal was dismissed in its entirety, but a memorandum of objections filed by the respondent was allowed to the extent of Rs. 300. The appeal involved a pure question of fact. It was held that the memorandum of objections was in effect a cross appeal and as the decree of this Court affirmed the decre of the trial Court in so far as the defendant's appeal was concerned, no leave to appeal could be granted. In the first place, this judgment is in conflict with the judgment of the same learned Judges in *Shanmuga Sundara Mudaliar* v. *Ratnavelu Mudaliar*[6]. In the second place, we consider that they erred in separating the appeal from the memorandum of objections and treating the orders of this Court thereon as embodying two separate decrees. Only one decree was drawn up and it certainly varied the decree of the trial Court. In these circumstances the appellant was entitled to a certificate granting leave to appeal and we must hold that that case was wrongly decided.

When the facts are appreciated, *Venkitaswami* v. *Sekkutti*[3], is not really in point. The facts are these. A mortgagee brought a suit on a mortgage bond which had been executed by the first and fourth defendants, the first defendant being

1. (1930) 35 L.W. 206.
2. (1926) 51 M.L.J. 295.
3. (1936) 71 M.L.J. 580 : I.L.R. 1937 Mad. 121.
4. (1938) 1 M.L.J. 487.
5. (1940) 2 M.L.J. 645.
6. (1928) 56 M.L.J. 476 : I.L.R. 52 Mad. 521.

a son and the fourth defendant the widow of a deceased Hindu. The second defendant was the brother of the first defendant and the third defendant was the son of the first defendant. The trial Court gave a decree against the first and fourth defendants for the full amount claimed, but held that the second and third defendants were liable only for a small part of the debt. The plaintiff appealed to this Court, which affirmed the trial Court's decree in so far as it affected defendants 1, 2 and 4, but reversed it in so far as the third defendant was concerned. It was held that he was liable for almost the full amount claimed. The plaintiff applied for leave to appeal against the second defendant. It was held by Venkatasubba Rao and Cornish, JJ., that he was not entitled to a certificate because this Court's decree in respect of the second defendant was one of affirmance. A distinction was drawn between the words "decree or final order" in clause (3) of section 110 and the term "the subject-matter" mentioned in clause (1). There all that the plaintiff was wanting to do was to challenge in the Privy Council the finding that the second defendant was only liable for a small portion of the decree. The appellate decree had certainly affirmed the trial Court's decree so far as the second defendant was concerned and the application for leave did not travel beyond him. Although we do not accept all the observations made in the judgment, we see no reason to question the correctness of the decision on the peculiar facts of the case.

The decisions in *Velayya* v. *H.R.E. Board, Madras*[1], and *Chockalingam Chetti* v. *Official Assignee, Madras*[2] do not go beyond *Venkitaswami* v. *Sekkutti*[3] and therefore it is not necessary to discuss them in detail.

In our judgment the petitioners are entitled under the provisions of section 110 to the certificate asked for by them. As we have indicated, they wish to challenge in the appeal to the Privy Council the validity of the plaintiff's claim with regard to ten of the eleven items of property and this Court's decree varied the decree of the trial Court in respect of four of the items. This being a decree of variation and not of affirmance, the petitioners are entitled as of right to a certificate and one will issue.

The proposed appeal does not involve any question of interpretation of the Constitution Act or any Order in Council passed thereunder.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Sree Rajah Vadrevu ViswaSundara Row Bahadur .. *Appellant**

v.

Vadlamannati Kusalaramayya (died) and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), sections 3 (11) and 8 and 9—Mortgage supported by consideration only to a partial extent—Sale in auction of properties including suit hypotheca in insolvency proceedings by Official Receiver—Auction purchaser—Extent of relief he can claim—Sons' shares in properties sold by Official Receiver for father's debt—Whether valid.

The first defendant and his two sons, second and third defendants, for whom also first defendant acted, mortgaged suit hypotheca to the plaintiff, first defendant's son-in-law, for a certain amount of which a major portion remained unpaid. Still the findings of the lower Court were that a portion of the consideration passed which was the amount claimed by the plaintiff in the suit. The sixth defendant happened to be the successful bidder at an auction held by the Official Receiver, in insolvency proceedings against the mortgagor, of the properties including the suit hypotheca. But the sixth defendant had nothing more than a contract of sale at the commencement of the coming into operation of the Agriculturists' Relief Act. Apart from that the sixth defendant was not an agriculturist. On the question of the extent of relief to be granted to the sixth defendant,

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1. (1938) 1 M.L.J. 487.
2. (1940) 2 M.L.J. 645.
3. (1936) 71 M.L.J. 580 : I.L.R. 1937 Mad 121.

*Appeals Nos. 56 and 192 of 1941. 18th April, 1945.

Held, (1) that the relief to which he should properly have been entitled on the assumption of the lower Court was a scaling down of the debt to the principal sum actually advanced under the mortgage with interest at 6¼ per cent. from first October, 1937. *Nachiappa Chettiar* v. *Merappa Goundan*, (1942) 1 M.L.J. 329 ref. Hence plaintiff would be entitled to a decree against sixth defendant for the entire amount of consideration that actually passed with interest at 7½ per cent. upto date of redemption and subsequent interest at 6 per cent.

As regards liability of the sons, second, and third defendants, for the debt of the father, and as regards the validity of the sale of shares by the Official Receiver,

Held, that the defendants 2 and 3 remained owners of their respective shares in the hypotheca after the sale, and were entitled to redeem the mortgage.

Virupaksha Reddi v. *Siva Reddi*, (1943) 2 M.L.J. 87 : I.L.R (1944) Mad 212 and *Suryanarayanamurthy* v. *Veeraju*, (1944) 1 M.L.J. 292 followed.

Appeals against the decrees of the Court of the Subordinate Judge of Masulipatam in O.S. No. 29 of 1937.

Appeal No. 56 *of* 1941.

P. Satyanarayana Rao and *V. Damodara Rao* for Appellant.

B. V. Ramanarasu, Ch. Raghava Rao, G. C. Venkatasubba Rao and *V. V. Sastri* for Respondents.

Appeal No. 192 *of* 1941.

Ch. Raghava Rao for Appellant.

P. Satyanarayana Rao, K. Kameswara Rao, V. Damodara Rao, B. V. Ramanarasu, G. C. Venkatasubba Rao and *V. V. Sastri* for Respondents.

The Judgment of the Court was delivered by

WADSWORTH, J.—These two appeals arise out of a suit on a mortgage, Ex. A, dated the 28th September, 1930. The first defendant on behalf of himself and his minor sons, the second and third defendants, mortgaged a large portion of his property to his son-in-law, the plaintiff, for a nominal consideration of Rs. 1,25,000 of which it is common ground, a major portion was not paid. The lower Court has found that the mortgage was supported by consideration to the extent of Rs. 55,287-8-0 which is the amount claimed by the plaintiff. In 1932, as a result of a petition filed by another creditor in April 1931, the first defendant was adjudged an insolvent. The execution of the suit mortgage, Ex. A, was one of the acts of insolvency alleged. The learned District Judge found that Ex. A was not a fraudulent transaction, but holding that another act of insolvency had been committed he adjudged the first defendant an insolvent. This decision was confirmed in appeal by the High Court which did not go into the question of the character of the present suit transaction. The suit on the mortgage was filed on the 29th September, 1937. On the 19th April, 1937, the Official Receiver, the fourth defendant, held an auction of the first defendant's properties including the hypotheca. The successful bidder was the sixth defendant, but the actual execution of the sale deed in his favour was not effected until the 20th January, 1939 and it was registered on the 10th May, 1939.

The sixth defendant is the appellant in A.S. No. 192 of 1941 and he seeks to challenge the lower Court's finding that the mortgage was a *bona fide* transaction supported by consideration to the extent of Rs. 55,287-8-0. We do not propose to go in detail into the question of consideration, for we are in full agreement with the finding of the learned Subordinate Judge. It seems to us quite clear that although the plaintiff is the son-in-law of the first defendant, he was only persuaded to enter into this transaction by the intervention of two pleaders interested in the family, one of whom was a creditor of the estate, and that the whole object of the transaction was to enable the first defendant to pay off his creditors. It appears moreover that the cash consideration was devoted to the discharge of the more pressing creditors and that in all probability the full consideration of the mortgage would have been advanced and utilised for the same purpose, had it not been for the economic disasters which afflicted the whole country shortly after the date

of the mortgage. The result of the depression was that the plaintiff found it difficult to collect his own dues and the creditors who had not been paid became nervous and precipitated matters by filing the insolvency petition. Having regard to the elaborate documentary evidence supporting the previous debts which are included in the suit mortgage and the absence of any indication that this evidence is not true, we agree with the lower Court in finding that the suit mortage was a valid transaction supported by consideration to the extent of Rs. 55,287-8-0. This disposes of A.S. No. 192 of 1941 which is dismissed with costs of first Respondent.

A.S. No. 56 of 1941 is the plaintiff's appeal which is concerned solely with the relief allowed to the sixth defendant by the lower Court under the Madras Agriculturists' Relief Act. The arguments of the appellant are, firstly, that the sixth defendant is not a debtor entitled to relief under the Act so far as the suit mortgage is concerned seeing that he acquired no interest in the hypotheca of the mortgage until the 20th January, 1939 : secondly, that the sixth defendant is not an "agriculturist" under that Act in that in July, 1935 he purchased three villages forming part of an estate in respect of which villages peishkush amounting to Rs. 738 and jodi amounting to Rs. 203 is payable so as to being into operation proviso (D) to section 3 (*ii*) of the Agriculturists' Relief Act ; and thirdly, that the scaling down of the debt has been carried too far, even assuming that the sixth defendant is entitled to relief. We are of opinion that the appellant should succeed on all these three contentions.

In order that the debtors may be entitled to releif under sections 8 and 9 of Act IV of 1938, there must be a "debt" at the commencement of the Act, that is to say, the 22nd March, 1938. At the commencement of the Act the sixth defendant owned no interest in the hypotheca. All that he had was a contract for the sale thereof in respect of which he had made a payment and was at that time disputing his liability to pay full stamp duty on the sale deed to be executed. Having regard to the terms of section 54 of the Transfer of Property Act it cannot be said that he owned any interest in the suit land so as to make him liable to discharge the debt thereon. (Vide *Perianna* v. *Sellappa*[1]). It is also clear that the sixth defendant was not an agriculturist. It is admitted that he purchased the three villages in respect of which peishkush and jodi are payable, in Court auction on the 22nd July, 1935. At the time when the lower Court's judgment was pronounced the sale was under attack, but it has since been confirmed and it is now undeniable that the sixth defendant is the titular owner of those villages. The lower Court accepted his contention that he was a benamidar for the fifth defendant in the purchase of these villages ; but even so it seems to us undeniable that the titular owner of an estate is, under the definition in section 3 (5) of the Madras Estates Land Act, a landholder, being a person entitled to collect the rent. The matter has been the subject of a previous decision by us. (*Narayanasami Reddy* v. *Veerasami Reddy*[2]). See also *Rangaswami Reddi* v. *Gopalakrishna Reddi*[3]. The question of the extent of the relief which could be granted to the sixth defendant if he were entitled to relief only becomes material if the case goes further. But it seems to us that the lower Court is clearly wrong in allowing the sixth defendant to claim relief with respect to the original principal of the antecedent promissory notes for which he was under no liability whatever. The relief to which he should properly have been entitled on the assumption of the lower Court was a scaling down of the debt to the principal sum actually advanced under the mortgage with interest at 6¼ per cent. from 1st October, 1937. The matter is covered by our decision in *Nachiappa Chettiar* v. *Marappa Goundan*[4]. The result therefore so far as the sixth defendant is concerned is that the plaintiff is entitled to a decree against him for Rs. 55,287-8-0 with interest at 7½ per cent. compound up to the date of redemption, and costs in both Courts and subsequent interest at 6 per cent. interest will be calculated from 28th September, 1930, on Rs. 52,287-8-0, and from 5th November, 1930 on Rs. 3,000.

1. (1938) 2 M.L.J. 1068 : I.L.R. 1939 Mad. 218.
2. (1940) 2 M.L.J. 711.
3. (1940) 2 M.L.J. 883.
4. (1942) 1 M.L.J. 329.

The question of the liability of the second and the third defendants under this decree forms the subject of a memorandum of cross objections filed in *forma pauperis*.

The contention of the second and third defendants is that the sale by the Official Receiver of the estate of their father, the first defendant, to the sixth defendant does not convey to him the title of the two sons, defendants 2 and 3. This contention is based on the full Bench decision in *Ramasastrulu* v. *Balakrishna Rao*[1], which has been extended to cases of sales of the sons' interest by the father by the decision of a division bench in *Virupaksha Reddi* v. *Siva Reddi*[2] which we have followed in *Suryanarayanamurthy* v. *Veeraju*[3]. It follows from these decisions that after the sale by the Official Receiver, defendants 2 and 3 remained the owners of their shares in the hypotheca. They are therefore entitled to redeem the mortgage.

They do not claim any relief under Madras Act IV of 1938. It has been urged by the sixth defendant that the Court should, without any claim on their behalf, find that they are entitled to relief as agriculturists, so that the relief which is given to them as mortgagors may enure to the benefit of the sixth defendant who is not an agriculturist. We have no doubt, held that when the mortgagors are given relief under Madras Act (IV of 1938) and the burden upon the property is thereby lightened, the fortuitous benefit of that relief will be enjoyed by a subsequent purchaser, though the latter is not himself entitled to claim the benefits of the Act. This fortuitous benefit, however, cannot be claimed as of right by the purchaser who is not an agriculturist. It is the accidental result of a claim successfully advanced by the mortgagors. In the present case, the mortgagors have not claimed such a benefit nor have they adduced any evidence to show that they are agriculturists. We therefore cannot accede to the request of the sixth defendant that the right of the mortgagors to relief should be investigated merely with the object of giving an accidental relief to the non-agriculturist purchaser. The memorandum of objections is therefore allowed with costs as against the sixth defendant and the decree will be amended so as to provide for the redemption of the mortgage by defendants 2 and 3 on payment of the amount of Rs. 55,287-8-0 with interest at 7½ per cent. compound calculated as indicated in the judgment on the main appeal up to the date of redemption.

Time for redemption—six months.

The sixth defendant will pay the Court-fee due to the Government on the memorandum of cross-objections.

K.C. *A. S.* 56 *of* 1941 *Allowed* ; *A. S.* 192 *of* 1941 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE LAKSHMANA RAO.

Srinivasaraghavan *alias* Srinivasa Chakravarthi and others ..*Appellants**

v.

Kalianna Goundan and others .. *Respondents.*

Deed—Construction—Mortgage by conditional sale or outright sale—Agreement to mortgage followed by "conditional deed of sale"—Stamp paper bought in the name of owner of the property—Patta not transferred—Deed one of mortgage by conditional sale.

The defendants 2 to 4 entered into an agreement with the plaintiffs on 18th June, 1934, which stated that "we have stipulated these conditions that I shall within two weeks' time execute a deed of usufructuary mortage in your favour in respect of the land belonging to me and described hereunder, for Rs. 7,000 . . . . stipulating a period of five years that, at the expiry of the period of five years aforesaid, I shall pay to you the aforesaid usufructuary mortgage amount of Rs. 7,000 and redeem the same and that in default of payment as aforesaid you shall take the land described hereunder

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1. (1942) 2 M.L.J. 457 : I.L.R. (1943) Mad. 83 (F.B.).
2. (1943) 2 M.L.J. 87 : I.L.R. (1944) Mad. 212.
3. (1945) 1 M.L.J. 292.

*L.P.A. No. 52 of 1945. 28th March, 1946.

for the aforesaid sum of Rs. 7,000 itself by way of absolute sale." As a result of this agreement on the 25th June, 1934, the defendants 2 to 4 executed in favour of the plaintiffs a deed described as a "conditional deed of sale for Rs. 7,000." It recited that "In order to discharge our family debt claims we have executed a conditional sale in your favour of the undermentioned lands for a sum of Rs. 7,000 . . . . We have all jointly agreed to the condition that, if we, with our own moneys, make payment to you in cash of the aforesaid sale consideration of Rs. 7,000, on the 25th June, 1939, the date of completion of five years from this date, you should execute in our favour a deed of resale reconveying the undermentioned land at our cost . . . . If we failed to pay you the said amount of Rs. 7,000 before the expiry of the aforesaid period of five years, you shall from the 26th June, 1939, hold and enjoy the undermentioned property with absolute rights". The stamp paper for the document was bought by the defendants and not the plaintiffs. The patta had not been transferred to the names of the plaintiffs. On a question whether the transaction of the 25th of June, 1934, constituted an absolute sale or a mortgage by conditional sale,

Held, in deciding this question the Court can only have regard to the two documents quoted, read in the light of the surrounding circumstances. The agreement of the 18th June expressly stated that the transaction was to be a usufructuary mortgage with the right of redemption at the end of five years. The fact that it proceeded to state that if the defendants do not redeem, the plaintiffs shall hold the property as owners cannot be construed as a conveyance to them before the expiry of the period fixed for redemption. The instrument of the 25th June is entirely in accordance with the agreement of the week before. The later document emphasises the fact that it is a deed of conditional sale. The plaintiffs were not to have the rights of ownership until there had been a failure to redeem. In the meantime the defendants were to retain an interest in the property and that interest is only the interest of the mortgagors. These taken along with the purchase of stamp by the defendants and the non-transfer of the patta, lead to the conclusion that the document should be read as constituting mortgage by conditional sale.

Appeal under Clause 15 of the Letters Patent against the judgment of Chandrasekhara Aiyar, J., dated 3rd August, 1945, in S.A. No. 1759 of 1944 preferred to the High Court against the decree of the District Court of Salem (Additional District Judge), in A.S. No. 92 of 1943, preferred against the decree of the Court of the Subordinate Judge of Salem in O.S. No. 44 of 1942.

T. V. Muthukrishna Aiyar and *V. N. Venkatavaradachariar* for Appellants.

The Advocate-General (*K. Rajah Aiyar*) and *S.S. Ramachandra Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether a transaction entered into on the 25th June, 1934, constituted an absolute sale or a mortage by conditional sale.

In O.S. No. 380 of 1935 of the Court of the District Munsiff of Namakkal the first defendant in the present suit obtained a money decree against the defendants 2 to 4 and in execution proceedings he attached the property in suit, 2.58 acres of agricultural land. The plaintiffs entered an objection. They claimed by virtue of the deed of the 25th June, 1934, to be the absolute owners of the property. By an order dated the 11th June, 1941, their petition was dismissed on the ground that it was belated. Thereupon they filed a suit under the provisions of Order XXI, rule 63 of the Code of Civil Procedure. They asked for a decree setting aside the order dismissing the claim petition and an injunction restraining the first defendant from proceeding in execution. This suit was originally filed in the Court of the District Munsiff, but as the value of the property exceeded the pecuniary limits of that Court's jurisdiction, the plaint was returned for presentation in the Court of the Subordinate Judge of Salem. The suit was tried by the Subordinate Judge, who held that the deed constituted a mortgage by consditional sale. This decision was upheld by the Additional District Judge of Salem on appeal. The plaintiffs then appealed to this Court. The appeal was heard by Chandrasekhara Aiyar, J., who disagreed with the Courts below. He was of the opinion that the transaction amounted to an absolute sale with a condition for re-purchase. The appeal is by defendants 2 to 4 under clause 15 of the Letters Patent.

The instrument of the 25th June, 1934, must be read with an agreement, dated the 18th June, 1934. This agreement was entered into with the plaintiffs by the third defendant as the manager of the joint family consisting of himself and his sons, the second and fourth defendants. It reads as follows :

"We have stipulated these conditions that I shall within two weeks' time execute a deed of usufructuary mortgage in your favour in respect of the land belonging to me and described hereunder for Rs 7,000 . . . . stipulating a period of five years, that, at the expiry of the period of five years aforesaid, I shall pay to you the aforesaid usufructuary mortgage amount of Rs 7.000 and redeem the same and that in default of payment as aforesaid you shall take the land described hereunder for the aforesaid sum of Rs 7,000 itself by way of absolute sale and therefore I have agreed that I would within the two weeks aforesaid execute the deed giving all the particulars, get the same registered and hand over the same to you and out of the said amount I have received from you on this date a sum of Rs. 500 in cash and as regards the balance remaining, I shall adjust the same towards the debts to be quoted in the deed when the document is executed, execute the document, get the same registered and deliver it to you; and I shall also deliver possession of the land to you ; I shall deliver possession of the property described hereunder free of all encumbrances. This itself shall be the receipt for the payment of the said sum of Rupees five hundred."

It will be observed that there is no agreement here for an absolute conveyance to the plaintiffs. The agreement is for the execution of a usufructuary mortgage with the condition that if the mortgage amount was not repaid within five years, the mortgagees should then have the right to retain the property as vendees.

The deed of the 25th June, 1934 was executed as the result of this agreement. It is described as a " conditional deed of sale for Rs. 7,000" and opens with this statement :

" Deed of conditional sale executed on the 25th day of June, 1934, corresponding to Tamil 11th Ani of Bhava, by us three namely".

Then follow the names of defendants 2 to 4 and the names of the plaintiffs in whose favour the deed was to be executed. The document proceeds :

" In order to discharge our family debt claims we have executed a conditional sale in your favour of the undermentioned nanja land, which belongs to individual No 1 out of us by virtue of adoption, for a sum of Rs 7,000."

After an acknowledgment of the receipt of Rs. 500 paid on the 18th June, 1934, and the receipt of the balance of the consideration there is this statement :

"As the total sum of Rs. 7,000 has, in the aforesaid manner, been received by us from you, in accordance with our request to you and in accordance with the conditional (arrangement) come to after discussion by us, both the parties, (that is), we have all jointly agreed to the condition that, if we, with our own moneys, make payment to you in cash of the aforesaid sale consideration of Rs. 7,000 on the 25th June, 1939, the date of completion of five years from this date, you should execute in our favour a deed of resale reconveying the undermentioned nanja land at our cost."

The words " in accordance with the conditional arrangement " mean in accordance with the agreement of the 18th June, 1934.

There are then these provisions :

" If we failed to pay you the said amount of Rs. 7,000 before the expiry of the aforesaid period of five years, you shall from 26th June, 1939, hold and enjoy the undermentioned property with absolute rights, hereditarily from father to son, grandson and so on, with rights of gift, exchange, sale, etc. After the period of five years neither we nor our heirs shall have any right or subsequent claim in respect of the undermentioned land."

In deciding whether the transaction between the parties constitutes an absolute sale with an option to re-purchase or a mortgage by conditional sale, the Court can only have regard to the two documents quoted, read in the light of the surrounding circumstances. See *Jhanda Singh* v. *Wahid-ud-din*[1]. We have no hesitation in holding that these two documents should be read as constituting a mortgage by conditional sale. In the first place, the agreement of the 18th June, 1934, expressly stated that the transaction was to be a usufructuary mortgage with the right of redemption at the end of five years. The fact that it proceeds to state that if the defendants do not redeem at the end of that period, the plaintiffs shall hold the property as owners cannot be construed as a conveyance to them before the expiry of the period fixed for redemption. In the second place the instrument of the 25th June, 1934, is entirely in accordance with the agreement of the week before. In the third place, the later document emphasises the fact that it is a deed of conditional sale. The plaintiffs were not to have the rights of ownership until there

1. (1916) 31 M.L.J. 750 : 43 I.A. 284 : 38 All. 705.

had been a failure to redeem. In the meantime the defendants were to retain an interest in the property. The words "After the period of five years neither we nor our heirs shall have any right or subsequent claim in respect of the under-mentioned land" can only imply that until the five years had expired, they retained an interest in the land. What interest could they have? Only the interest of mortgagors.

We will now look at the surrounding circumstances. The stamp paper for the deed of the 25th June, 1934, was bought by the second defendant and not by the plaintiffs. If it had been intended to give an absolute title to the plaintiffs, theirs would have been the obligation to provide the stamp paper and defray the cost of the conveyance. If the transaction amounted to a mortgage, the stamp paper would have to be bought by the mortgagors, and it was bought by them. The patta was not transferred to the names of the plaintiffs. It stands to this day in the name of the third defendant.

The learned Advocate-General has laid emphasis on the fact that the deed stipulates that the defendants should only have the right of resale if they produced the Rs. 7,000 out of their own pocket. In *Jhanda Singh* v. *Wahid-ud-din*[1], there was a similar stipulation, and in the course of the judgment which was delivered by Lord Atkinson their Lordships said :

"The stipulation is wholly inconsistent with the relation of mortgagor and mortgagee."

But this observation cannot be isolated from what was said before. Their Lordships were considering what was the effect of a stipulation in a later document. By a deed dated the 29th August, 1852, there was an absolute sale of certain property. On the 5th September, 1852, another instrument was executed under which the vendees agreed to resell the property at the end of nine or ten years if the vendors paid the amount of the purchase consideration out of their own pocket without mortgaging or selling the property to other persons. The later document expressly stated that the vendees were entering into it in order to help the vendors and out of kindness towards them. It was in this connection that their Lordships observed that the stipulation was wholly inconsistent with the relation of mortgagor and mortgagee. That their Lordships did not intend to imply that such a stipulation was conclusive is obvious from what they said later. They concluded their remarks on this portion of the case by saying that the provision made against the appellant's contention rather than in favour of it.

We do not regard the stipulation in the present case that the redemption should be out of the private funds of the defendants as altering the character of the deed of the 25th June, 1934. The two documents must be read as a whole and when this is done, we can see no other conclusion open than that the transaction was a mortgage by conditional sale.

The learned Advocate-General has also referred to the fact that the document concludes with this statement :

"By whomsoever out of us the said amount is paid on the due date, the resale shall be made in his favour."

He suggests that this is inconsistent with the right of redemption and merely gives the option to one of the defendants. We do not agree. It is merely a provision that the amount could be paid by any one of the defendants and in this event the reconveyance would be to him.

For these reasons we allow the appeal with costs in this Court and before Chandrasekhara Aiyar, J.

V.S. *Appeal allowed.*

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1. (1916) 31 M.L.J. 750 : 43 I.A. 114 : 38 All. 570.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE HAPPELL.

In re a Pleader, Gudivada.*

Legal practitioner—Responsibility in respect of statements in the affidavit of his clients drafted and filed by him on instructions—Extent and nature of.

It is well settled that although a legal practitioner has his duty towards his client, he has other duties and responsibilities as well and that he should not on the instructions of his client make a charge of fraud against another in an affidavit without satisfying himself that there are reasonable grounds for the allegation. But he has not got to satisfy himself that the statements made by his client were absolutely true. All that is incumbent on him is to satisfy himself that there are reasonable grounds for believing them to be true.

The Advocate-General (*K. Rajah Aiyar*) in support of the Notice.

P. Satyanarayana Rao for *P. Sivaramakrishnaiah* for the Pleader.

T. C. A. Bhashyam for Complainant.

The Judgment of the Court was delivered by

The Chief Justice.—The complainant and the respondent are pleaders practising at Gudivada. Last year the complainant was appointed by the District Munsiff of Gudivada to fulfil the duties of a Commissioner in giving to a client of the respondent delivery of land which she had purchased at a Court auction. She had previously attempted to get possession, but she had been obstructed. It is common ground that the complainant, the decree-holder and the respondent's clerk went to the property on the 13th February, 1945, in order that the complainant might deliver the land to the decree-holder. According to the respondent delivery was given by the complainant to the client and a receipt was signed by her in acknowledgment. On the 16th February, 1943, that is, three days later, the complainant reported to the District Munsiff that he could not give delivery of the property because the decree-holder was not able to point out the boundaries. On the 19th February, 1945, the decree-holder swore an affidavit drafted by the respondent in which she alleged that delivery had in fact been given to her, but that the Commissioner had colluded with the judgment-debtor as the result of which he had suppressed the receipt given by her and had filed a false report. In the affidavit it was stated that the complainant had filed a false report with the intention of obtaining wrongful gain, which meant that he had been paid by the judgment-debtor. The matter was inquired into by the District Munsiff who held that the charges against the complainant were false. This resulted in the following charges of professional misconduct being framed against the respondent :—

"(1) That you have filed a petition on behalf of the purchaser (decree-holder) in O. S. No. 53 of 1935 on the file of Bandar District Munsiff's Court with the allegations that the petitioner herein made a false report that delivery was not effected when delivery in fact was effected, that delivery receipt was taken from the decree-holder-purchaser by the petitioner herein, that it was suppressed with a dishonest motive and that the petitioner was won over by the opposite party with a bribe.

(2) That you did so with the full knowledge that the above allegations are false, reckless, scandalous, defamatory and unprofessional.

(3) That you made the abovesaid allegations against the petitioner who was the Commissioner appointed by this Court and as such a public servant with the knowledge that if accepted as true by the Court, they would have debarred the petitioner from practising any longer as pleader and would have further made him criminally liable."

Considerable evidence was taken in the course of the inquiry which the District Munsiff conducted. He has reported that it has not been proved that the respondent had drafted the affidavit with the full knowledge that all the statements made therein were false, but he considered that the respondent had acted rashly

* Referred Case No. 14 of 1946. 25th March, 1946.

and with "credulousness." Consequently he recommended that the respondent be warned. The District Judge in forwarding the report agreed with the findings of the District Munsiff.

In *Thangavelu Mudaliar* v. *Chengalvaraya Gurukkal*[1], this Court pointed out that although an advocate has his duty towards his client, he has other duties and responsibilities as well. He should not on the instructions of his client make a charge of fraud without satisfying himself that there are reasonable grounds for the allegation. That principle is well settled.

Now, had the respondent in this case reason for accepting his client's instructions. We consider that he had. His clerk who was present on the 13th February, 1945, reported to him that delivery had been given to the decree-holder and that a receipt had been taken from her. These statements were in accord with the statements made by the decree-holder herself. It was said that the receipt which she gave was signed by one witness and this fact was mentioned in the affidavit. On the next day a discussion took place in the room of the Bar Association at Gudivada as to whether the signature of one witness to such a receipt was sufficient. The complainant was present at this conversation and in fact initiated the discussion. On this occasion the respondent paid to the complainant his fee for acting as the Commissioner. The complainant did not mention that he had not been able to give delivery to the respondent's client.

In these circumstances we think that the respondent was justified in drafting and filing the affidavit complained of. He has not got to satisfy himself that the statements made by his client were absolutely true. All that was incumbent on him was to satisfy himself that there were reasonable grounds for believing them to be true. It follows from what we have said that we consider that there were reasonable grounds for this belief. In these circumstances we are unable to agree with the District Munsiff that the respondent acted recklessly or with undue credulity.

The complaint against him is dismissed.

V.S. ——— *Complaint dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Doodala Rudrayya .. *Appellant**

v.

Rajah Saheb Meharbhan I Dostan Sree Rajah Ravu Venkata Kumara Mahipathi Surya Rao Bahadur Garu Sardar, Rajahmundry Circar and Maharajah of Pithapuram .. *Respondent.*

Madras Estates Land Act (*I of* 1908), *section* 112—*Decree for arrears of rent—Sale of entire holding—Some of several defendants not served with notice—Effect—Party served with notice—Whether bound by sale regarding his interest.*

The plaintiff-respondent obtained a decree for arrears of rent due in respect of a holding in an estate against the appellant who was the first defendant and others and in execution of the decree an extent of one acre and twenty-four cents in that holding was brought to sale as property belonging to the appellant. It appeared that though the entire land was described as belonging to the appellant only twenty-four cents belonged to him and the remaining one acre belonged to the other defendants. The question having been raised as to the validity of the sale in the absence of notice to the other defendants,

Held, that the sale was not binding on the shares of the other defendants, but that it was binding on the appellant-defendant so far as his interest therein was concerned.

Thayammal v. *Subramania Gurukkal*, (1935) 69 M.L.J. 850, relied on.

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1. (1935) 69 M.L.J. 250.

*S.A. No. 1032 of 1945. 4th March, 1946.

Appeal against the decree of the Court of the Subordinate Judge, Coconada, in A. S. No. 47 of 1944 preferred against the decree of the Court of the District Munsiff, Coconada, in O. S. No. 428 of 1942.

D. Narasaraju for Appellant.

Ch. Raghava Rao for Respondent.

The Court delivered the following

JUDGMENT.—The respondent in this second appeal obtained a decree for arrears of rent due in respect of holding No. 88 in the village of Somapara in the Pittapur estate in L. S. No. 251 of 1938 on the file of the Deputy Collector, Coconada, against the appellant and others and in execution of this decree, an extent of one acre and 24 cents in that holding was brought to sale as property belonging to the present appellant and it was purchased by the respondent on the 26th October, 1941. The respondent and his alienee (the sixth defendant) were prevented from obtaining possession of the property and on the allegation that there was a trespass by the defendants subsequent to the delivery, the respondent brought a suit out of which the present appeal arises for recovery of possession of the entire property from defendants 1 to 5 and 7 to 9.

Though the entire extent of one acre and 24 cents was described as belonging to the appellant, it is now common ground that one acre of that extent belongs to defendants 2 to 5 and only 24 cents belong to the first defendant (appellant). The District Munsiff of Coconada found that defendants 2 to 5 had not been served with any notice of execution ; in fact the property had been brought to sale as the property of the first defendant. He therefore held that the sale was void in respect of the one acre of land belonging to defendants 2 to 5 ; but he found the sale to be valid in respect of the 24 cents belonging to the first defendant and granted a decree against him in respect thereof. There was an appeal by the first defendant and the learned Subordinate Judge has confirmed the decision of the District Munsiff. This second appeal is by the first defendant.

The only point which requires consideration in this second appeal is whether the sale in its entirety should be set aside because of lack of notice to defendants 2 to 5 or should the sale be held valid in respect of the 24 cents belonging to the first defendant.

There is very little of authority on this question. The case in *Thayammal* v. *Subramania Gurukkal*[1], appears to be the nearest in point. In that case the plaintiffs were entitled to a fourth share in the holding while defendants 1 to 3 were entitled to the remaining shares. The entire holding was sold for arrears of rent ; but the plaintiffs were not served with notice of the sale. Defendants 1 and 2 were personally served with notice of sale. On these facts the Courts below set aside the sale in respect of the entire extent. The auction purchaser preferred a second appeal to this Court. It was contended by him that the sale must be set aside only as regards the plaintiffs' shares and not in its entirety, and this contention was accepted by Varadachariar, J. No doubt in that case defendants 1 to 3 had not only not prayed for the setting aside of the sale in respect of their shares but they had even prayed that the plaintiffs' suit should be dismissed with costs. The learned Judge characterises their conduct or misconduct as being dishonest, but I do not consider that his decision rests on this circumstance only. The learned Judge repels the argument that service of notice under section 112 is a matter going to the jurisdiction of the selling officer and, if all the necessary pre-requisites had not been complied with, he must be held not to have any jurisdiction, and it must follow that the entire sale is invalid. The learned Judge modified the decree of the Courts below by setting aside the sale so far as the plaintiffs' share is concerned. He incidentally relied on certain observations of Ramesam, J., in *Kootoorlingam Pillai* v. *Sennappa Reddiar*[2]. These observations were no doubt *obiter* but support the view taken by the learned Judge.

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1. (1935) 69 M.L.J. 850. 2. (1931) 61 M.L.J. 203 at 206.

In the absence of any other authority I feel bound by the above decision. The analogy furnished by cases decided under the Code of Civil Procedure supports the same view. In *Srishchandra Nandi* v. *Rahatannessa Bibi*[1], Mukherji and Mitter, JJ., held that an auction sale held in execution of a decree without serving notice under Order 21, rule 22 of the Code of Civil Procedure, on one of the judgment-debtors is not void in its entirety, but it only does not bind the share of that judgment-debtor.

Mr. Narasaraju, the learned advocate for the appellant, relied on the decision of the Patna High Court in *Bachoo Prasad* v. *Gobardhan Das*[2]. On an examination of the facts of that case it is clear that the decision in that case has no bearing on the present case. In the case before the Patna High Court, in execution of a money decree against a number of members of a joint family certain properties of the joint family were brought to sale. In the execution proceedings it was found that no notice was issued to the guardian *ad litem* of the minors under Order 21, rule 22 of the Code of Civil Procedure. Their Lordships held that the sale of the share of the minors was unsustainable. There was an application by three of the members of the family under section 47 and also under Order 21, rule 90, to set aside the sale. Having held that the sale of the share of the minor was invalid they proceeded to deal with the contention that the sale should be set aside in its entirety. In doing so they observe as follows:

"Mr. Mahabir Prasad's last contention was that the sale which purported to be a sale of the entire property, a house, should either stand or be set aside as a whole. There is I think substance in the contention. This is not a case in which the sale has been confirmed, possession taken and enjoyed for years but in respect of part or a share of the property without title. In that state of things there are cases in which the purchaser has retained possession of so much of the property as could in those proceedings have been validly sold to him. It was indeed too late to set aside the entire sale. But here the sale not having been yet confirmed . . . . it is to be considered what was being put up for sale and for what the purchaser was bidding. If there was not a mutual understanding between the Court and the bidders as to what was being put up to sale, it is difficult to say that such a sale can be confirmed."

No doubt this decision might have a bearing if there was a suit by the first defendant to set aside the sale in respect of the 24 cents belonging to him; but the present suit is not such a suit. The sale has been confirmed in proceedings of which the first defendant had notice and the first defendant never took any proceedings to challenge the validity of the sale. The reasoning of the learned Judges of the Patna High Court cannot obviously apply to a case like the present where the question is not whether the sale should be set aside or not but whether the sale can be held to be completely void.

Mr. Narasaraju mentioned two other points which were raised in the Court below, namely, that the upset price was reduced by the selling officer and the plaintiff had not obtained permission to bid at the sale. There is no substance in either of these contentions. Further, I do not think that the first defendant can be permitted to raise these objections in this suit, which is not a suit for setting aside the sale.

In the result, the second appeal is dismissed with costs. Leave refused.

B.V.V. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE HAPPELL.

Kadir Bibi and others .. *Appellants**

v.

M. V. Mailappa Pillai and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 60—Provision for redemption on payment on a particular date—If a clog on the equity of redemption—Right of mortgagee to reasonable notice—Provision for redemption in non-cultivation season reasonable.

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1. (1930) I.L.R. 58 Cal. 825.
2. A.I.R. 1940 Pat. 62.

*Appeal No. 58 of 1945. 14th March, 1946.

Though section 60 of the Transfer of Property Act is unqualified in its terms and contains no saving provision, as other sections do, in favour of contracts to the contrary, it does not, however, mean that the parties to a mortgage are precluded from deciding for themselves what is reasonable notice.

A usufructuary mortgage after providing for redemption on the expiry of a period of three years and three months from the date of the deed, further provided that if the mortgagor did not redeem on the date contemplated by the deed he shall have the right of redemption by paying the amount secured on the 30th of Pangumi (12th April,) of any subsequent year. The purchaser of the equity of redemption deposited the mortgage amount in Court in September of a succeeding year and on the refusal of the mortgagee to accept the same and on the dismissal of the application under section 83, Transfer of Property Act, filed a suit for possession and claimed mesne profits from the date of the service on the mortgagee of the notice of deposit of the mortage amount.

Held, by providing that there should be redemption only on 30th Panguni, the parties themselves decided what should be regarded as reasonable notice and under section 60 of the Transfer of Property Act, the mortagee is entitled to reasonable notice. It was certainly reasonable to provide that there should be no right of redemption during the cultivation season. The provision for redemption in question does not amount to a clog on the equity of redemption and consequently the plaintiff was not entitled to a decree for mesne profits prior to the date of his plaint.

Case law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul dated 26th October, 1944, and passed in O. S. No. 29 of 1944.

A. C. Sampath Aiyangar and *S. Krishnamachariar* for Appellants.

C. A. Seshagiri Sastri for 1st Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal is concerned with the interpretation of section 60 of the Transfer of Property Act.

On the 30th January, 1929 the tenth defendant executed a usufructuary mortgage of the land in suit in favour of the husband of the first defendant and the father of the second, third and fourth defendants to secure the sum of Rs. 7,000. The mortgagee died before the institution of the action. The mortgage deed provided that the mortgagor should have the right of redemption after the expiry of the period of three years and three months from the date of the deed. Obviously the three months were added to the three years in order that the right of redemption should fall within the fallow period. The deed further provided that if the mortgagor did not redeem on the date contemplated by the deed, he should have the right of redemption by paying the amount secured on the 30th Panguni (12th April) of any subsequent year. On the 10th July, 1942, the plaintiff purchased the equity of redemption and on the 13th March, 1943, he served upon the mortgagee a notice asserting his right to redeem the mortgage on the 30th Panguni. It was obviously his intention to redeem on that date. Unfortunately he had not then the money and he took no further steps until the 27th September, 1943, when he deposited the Rs. 7,000 in Court under section 83 of the Transfer of Property Act. Notice of this deposit was served upon defendants 1 to 4 on the 9th October, 1943. The cultivation season had then commenced and they refused to accept the money. They maintained that under the terms of the deed of mortgage the redemption could not take place until the 12th April, next following. The Court accepted the contention and dismissed the plaintiff's application under section 83 of the Transfer of Property Act.

On the 17th April, 1944, this suit was filed. The plaintiff asked for a decree for possession and for mesne profits from the 9th October, 1943. A decree in terms of the prayer was granted. Defendants 1 to 4 have appealed. They accept the decree in so far as it gives the plaintiff the right to redeem, but they say that the Subordinate Judge erred in awarding to him mesne profits prior to the date of the plaint.

In deciding for the plaintiff the Subordinate Judge relied on the decisions of this Court in *Suppan Chettiar* v. *Rangan Chetty*[1], and *Govinda Menon* v. *Chathu Menon*[2].

1. A.I.R. 1938 Mad. 405.
2. A.I.R. 1914 Mad. 563.

The judgments in these cases run contrary to the judgments delivered by the Court in *Chinnaswami Reddiar* v. *Krishna Reddi*[1] and *Kangaya Gurukkal* v. *Kalimuthu Annavi*[2]. We shall refer to these cases in detail presently; but before doing so we must refer to the provisions of section 60 of the Transfer of Property Act.

The section gives the right to the mortgagor to redeem at any time after the principal money has become due, on payment or tender to the mortgagee, at a proper time and place, of the mortgage money; but it further provides that nothing in the section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass, or no time has been fixed for its payment, the mortgagee shall be entitled to reasonable notice before payment or tender of the mortgage money. In *Muhammad Shar Khan* v. *Raja Seth Swami Dayal*[3], the Privy Council pointed out that section 60 is unqualified in its terms and contains no saving provision, as other sections do, in favour of contracts to the contrary. This does not, however, mean that the parties to a mortgage are precluded from deciding for themselves what is reasonable notice.

In *Suppan Chettiar* v. *Rangan Chetty*[4], a deed of mortgage gave the right of redemption after ten years from the date of the instrument and contained a further stipulation that if the mortgagor did not redeem on that date, he was to be entitled to redeem only on the 30th Ani (13th or 14th July) in any succeeding year. It was held by a Division Bench that this amounted to a clog on the equity of redemption. In delivering the judgment of the Court Venkatasubba Rao, J., expressed the opinion that the stipulation for payment on a particular date was oppressive and unreasonable. On this footing it was decided that the mortgagor in that case was entitled to redeem on the 27th July, 1921, the date on which he deposited the mortgage amount into Court.

In *Govinda Menon* v. *Chathu Menon*[5], Sadasiva Ayyar and Spencer, JJ., held that when the mortgage debt has become payable under the terms of the deed a suit for redemption cannot be resisted on the ground that the money was only payable within certain dates. It does not appear from the report whether the mortgage in that case was a simple or a usufructuary mortgage. If it was a simple mortgage, the judgment is not in point. If, on the other hand, it was a usufructuary mortgage, the judgment must be read as supporting the view expressed in the case first mentioned.

The decision in *Chinnaswamy Reddiar* v. *Krishna Reddy*[6], is in direct conflict with the decision in *Suppan Chettiar* v. *Rangan Chetty*[4] There a usufructuary mortgage deed provided that the mortgagor should pay back the amount within three years and if he failed to redeem them, he should have the right of redemption only in the month of Ani (June—July) in a subsequent year. The Court (Subramania Aiyar and Moore, JJ.) held that this was a valid provision and that the mortgagor could not recover the property in any year at a date earlier than June—July as, if he did so, he would deprive the mortgagee of the crops grown on the land.

Kangaya Gurukkal v. *Kalimuthu Annavi*[2] was decided by a Full Bench. This was another case of a usufructuary mortgage. Here the deed contained this provision:

"Thereafter on the 30th Panguni, Bava year, causing the aforesaid Rs. 200 to be paid (on paying the aforesaid Rs. 200) we shall redeem or (recover back) our land. If on the date so fixed the amount be not paid and the land recovered back, in whatever year we may pay the Rs. 200 in full on the 30th Panguni of any year, then you shall deliver back our lands to us."

This mortgage is on all fours with the mortgage with which the present appeal is concerned. The Court regarded the payment in any subsequent year on the 30th Panguni as a valid term, but the judgment contains no discussion of the question.

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1. (1906) 16 M.L.J. 146.
2. (1903) 14 M.L.J. 61 : I.L.R. 27 Mad. 526 (F.B.).
3. (1921) 42 M.L.J. 584 : L.R. 49 I.A. 60 : I.L.R. 44 All. 185 (P.C.).
4. A.I.R. 1938 Mad. 405.
5. A.I.R. 1914 Mad. 563.
6. (1906) 16 M.L.J. 146.

Two decisions of the Allahabad High Court also support the contention of the appellants. The first was given in *Gokul Kalwar* v. *Chandar Sekar*[1] where it was held that in the case of a usufructuary mortgage redeemable during the fallow season it is for the mortgagor to do everything that is necessary to enable the mortgagee to vacate possession during that particular season.

If this is not done, the mortgagee is entitled to remain in possession until the next fallow season, and, being thus lawfully in possession he is not liable for mesne profits. The second case is *Kirpal Singh* v. *Sheambar Singh*[2]. In that case there was a mortgage by conditional sale which gave the mortgagor the right of redemption on payment of the amount in the month of *Jeth* within fifteen years of the deed. It was held that it did not amount to a clog on the equity of redemption inasmuch as the intention was to permit redemption only at a time when the crops were not standing.

By providing that there should be redemption only on the 30th Panuguni, the parties in the present case themselves decided what should be regarded as reasonable notice and as we have seen, under the provisions of section 60 of the Transfer of Property Act, the mortgagee is entitled to reasonable notice. It was certainly reasonable to provide that there should be no right of redemption during the cultivation season. It is in fact manifestly fair that redemption should take place during the fallow season. We hold that the provision for redemption on payment on the 30th Panguni does not amount to a clog on the equity of redemption and consequently the plaintiff was not entitled to a decree for mesne profits prior to the date of plaint.

The appeal will be allowed and the decree of the trial Court modified accordingly.

The appellants are entitled to their costs here and proportionate costs in the Court below as against the plaintiff.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONAL LEACH, *Chief Justice*, AND MR. JUSTICE LAKSHMANA RAO.

Tarlada Krishna Rao and another .. *Appellants**

v.

Gonti Bairagi and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 47, Order 21, rule 2 and Order 34, rule 5—Mortgage decree—Mortgagors if entitled to set-off in execution a claim against the decree-holders for damages resulting from their failure to supply funds to the receiver (appointed before the decree) for the institution of suits for the recovery of rents due by the mortgagors' tenants—Claim if relates to execution, discharge or satisfaction of decree.

A judgment-debtor has no right to set-off in execution of the decree passed against him a claim for damages which does not arise under the decree. The mortgagors are not entitled to set off in proceedings instituted for the execution of a mortgage decree passed against them a claim for damages against the (mortgagees) decree-holders based on their failure to supply funds to the receiver appointed before the decree for the institution of suits for the recovery of the rents due by the mortgagors' tenants. A judgment-debtor cannot evade payment of the decretal amount or obtain a reduction in the sum declared by the decree to be payable because he happens to have a claim for damages against the decree-holder for something done, or omitted to be done by him, which leaves the hypotheca unaffected.

Hari v. *Sakharam*, (1923) 25 Bom.L.R. 449, *Bai Lalbu* v. *Mohanlal*, (1925) 27 Bom.L.R. 687 and *Dhanarajgirji* v. *Parthasarathi*, (1932) I.L.R. 57 Mad. 49 distinguished.

Such a claim cannot be treated as a matter "relating to the execution, discharge or satisfaction" of the mortgage decree. A plea to be allowed to set-off in execution proceedings a claim for damages is repugnant to the scheme of the Code and is outside the scope of the principle of equitable set-off which has been applied in certain suits.

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1. (1926) I.L.R. 48 All. 611.
2. A.I.R. 1930 All. 283.

*L.P.A. No. 62 of 1945. 8th March, 1946.

Appeal under clause 15 of the Letters Patent against the judgment and order of Yahya Ali, J., dated 29th August, 1945 in A.A.O. No. 515 of 1944 preferred against the order of the Court of the Subordinate Judge of Chicacole, dated 22nd March, 1944 in E.A. No. 145 of 1943 in E.P. No. 137 of 1941 in O.S. No. 41 of 1932 Sub-Court, Berhampore.

B. Jagannadha Das and *C. V. Dikshitulu* for Appellant.

K. Subba Rao for Respondents.

The Judgment of the Court was delievered by

The Chief Justice.—The question in this appeal is whether a set-off can be pleaded in execution proceedings.

In O.S. No. 41 of 1932 of the Court of the Subordinate Judge of Berhampore, the appellants sued the respondents to enforce a mortgage. On the 28th March, 1935 they obtained a preliminary decree for the payment of Rs. 6,539-4-0. On the 5th December, 1938 a final decree was passed for the same amount. The respondents then applied under the provisions of the Madras Agriculturists Relief Act for the scaling down of the decree. On the 21st September, 1939, they obtained an order scaling down the decree to Rs. 2,581-7-0.

The properties mortgaged consisted of agricultural lands which the respondents had leased to tenants. On the 16th April, 1934, that is, before the preliminary decree was passed, the appellants applied for the appointment of a receiver to collect the rents due. The tenants refused to attorn to the receiver and the only course open to him was to file suits to recover the amounts due. The appellants failed to put the receiver in funds necessary for the institution of such suits and consequently the receiver took no action. On the 8th January, 1943, that is, over four years after the final decree had been obtained, the respondents applied to the Court to discharge the receiver and their application was granted.

In 1941 the appellants instituted proceedings in execution. The application for the sale of the mortgaged property was resisted by the respondents, who claimed that the receiver should have collected from the tenants some Rs. 9,000 which, they said, should be set-off against the decretal amount. They went further and asked the Court to order the appellants to pay to them the excess. The Subordinate Judge held that this application lay. After inquiry he came to the conclusion that as the result of the receiver's inaction, for which the appellants were responsible, the respondents had been damnified to the extent of Rs. 1,000 and he directed that the amount should be set-off against the sum due under the decree. The appellants challenged the validity of this order in an appeal to this Court. The appeal was heard by Yahya Ali, J., who agreed with the decision of the Subordinate Judge. The present appeal is from the judgment of Yahya Ali, J., under clause 15 of the Letters Patent.

In deciding in favour of the respondents Yahya Ali, J., relied on the judgments of the Bombay High Court in *Hari* v. *Sakharam*[1], and *Bal Lalbu* v. *Mohanlal*[2], and the judgment of this Court in *Dhanarajgerji* v. *Parthasarathi*[3]. These cases have been fully examined in the course of the arguments addressed to us. In our opinion they do not support the learned Judge's decision.

In *Hari* v. *Sakharam*[1], the plaintiff had obtained a decree for possession of certain lands, but before he was put into possession the judgment debtor committed waste by cutting down certain trees. In execution proceedings the decree-holder sought to recover from the judgment-debtor the amount by which the property had depreciated in value as the result of the waste committed. The Bombay High Court held that this was a matter which could be investigated in execution proceedings. The decree-holder was entitled to possession of the property in the

1. (1923) 25 Bom.L.R. 449.
2. (1925) 27 Bom.L.R. 687.
3. (1932) I.L.R. 57 Mad. 49.

state which it was in when the decree was passed and as the result of the action of the judgment-debtor it had deteriorated in value. Therefore he was entitled to possession of the property *plus* a monetary payment to bring it up to the value at the date of the decree. The same principle was applied by the Bombay High Court in *Bai Lalbu* v. *Mohanlal*[1]. Here Macleod, L.J., said—

"There does not appear to be much difference between a case where an appeal has been filed, and the party remaining in possession commits waste, and a case where possession is directed to be given by a decree, and before possession is given waste is committed. The question is really whether a successful party can be said to get possession of what was directed to be given to him by the decree. If the party in possession deliberately has caused damage to the property there is no reason why the question of damage should not be tried in execution."

These two cases were approved of by a Bench of this Court in *Dhanarajagerji* v. *Parthasaradhi*[2]. In delivering the judgment of the Court, Venkatasubba Rao, J. emphasised that when a decree awards a person a certain property he is entitled to get the property in the state in which it was when the decree was passed. The question whether a judgment-debtor is entitled in execution proceedings to plead a set-off did not arise in any of these cases and therefore was not considered.

In the course of his argument Mr. K. Subba Rao, on behalf of the respondents, drew our attention to the decision of this Court in *Ramanatha Aiyar* v. *Abdul Salam Sahib*[3], and suggested that the decision there goes further than those already considered. We do not agree. This was a case of a usufructuary mortgage in which a final decree for sale had been passed. The mortgagee was in possession. It was alleged by the judgment-debtor that he had committed acts of waste and consequently he was entitled to credit for the amount of the damage. The Court held that the principle on which the Bombay case and *Dhanarajagerji* v. *Parthasaradhi*[2], had been decided applied; in other words, the Court in executing a decree was entitled to inquire into waste committed after the decree whether it be committed by the judgment-debtor or by the decree-holder.

What we are considering in the present case is whether the respondents are entitled to set-off in proceedings instituted for the execution of a mortgage decree passed against them a claim for damages against the decree-holders based on their failure to supply funds to the receiver for the institution of suits for the recovery of the rents due by the respondents' tenants. To decide this question we can only look to the provisions of the Code of Civil Procedure. There is nothing in the Code which even suggests that a judgment-debtor has the right of setting off in execution of the decree passed against him a claim for damages which does not arise under the decree. Order 21, rule 2, applies to a payment or an adjustment out of Court in a case where money is payable under "a decree of any kind". In emphatic terms the rule precludes a Court executing a decree recognising a payment or adjustment which has not been certified or recorded. The respondents say that this rule is not applicable because there has been neither payment nor adjustment. This is true, but the rule certainly qualifies to a very material extent the broad language of section 47 of the Code and we can look at the rule when ascertaining the scheme of the Code in matters of execution.

What is due here is the sum of Rs. 2,581-7-0 *plus* subsequent interest and under the provisions of Order XXXIV, rule 5, the decree-holder is entitled to have the property sold in order to realise the decretal amount. In *Madan Theatres, Ltd.* v. *Dinshaw and Co., Bankers, Ltd.*[4], the Privy Council held that an adjustment made between the date of the preliminary decree and the final decree could be taken into consideration at the time of the passing of the final decree because Order 21, rule 2 only applies in execution and there is nothing in the Code to qualify the provisions of Order XXIII, rule 3. In the present case no objection was taken to the passing of the decree for the amount claimed by the appellants. The receiver had been appointed even before the passing of the preliminary decree and it was not suggested at any stage before the passing of the final decree that the respondents

1. (1925) 27 Bom.L.R. 687.
2. (1932) I.L.R. 57 Mad. 49.
3. (1945) 1 M.L.J. 67.
4. (1945) 2 M.L.J. 367 (P.C.).

were entitled to a reduction as a result of the failure of the receiver to collect rents due by the tenants.

Mr. K. Subba Rao, has conceded that his clients' claim must be limited to the loss suffered after the passing of the final decree, but he says that the subsequent loss is a matter "relating to the execution, discharge or satisfaction of the decree." This is not so. A judgment-debtor cannot evade payment of the decretal amount or obtain a reduction in the sum declared by the decree to be payable because he happens to have a claim for damages against the decree-holder for something done, or omitted to be done, by him, which leaves the hypotheca unaffected. It may be that the respondents have a claim for damages against the appellants—we express no opinion upon the question—but the value of the lands mortgaged remains unaffected and therefore the claim cannot be treated as a matter "relating to the execution, discharge or satisfaction" of the mortgage decree. A plea to be allowed to set-off in execution proceedings a claim for damages is repugnant to the scheme of the Code and is outside the scope of the principle of equitable set-off which has been applied in certain suits.

For these reasons, the appeal is allowed and the case will be remanded to the execution Court to proceed with the execution without regard to the respondents' claim to set-off.

The respondents have asked that their petition to set-off be treated as a suit under the provisions of section 47 (2). This is reasonable and, subject to any objections as to limitation or jurisdiction it will be treated as a suit. If any such objection is preferred, it will be decided in the suit. The respondents will, of course, have to pay any additional Court-fee which may be required.

The appellants are entitled to their costs throughout.

K.S. — *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the Supreme Court of the Island of Ceylon.)

PRESENT :—VISCOUNT SIMON, LORD THANKERTON AND SIR JOHN BEAUMONT.

Abdul Hameed Sitti Kadija and another .. *Appellants**

v.

Frederick John De Saram and others .. *Respondents.*

*Will—Construction—*Fidei commissum*—Doubt as to creation of—Construction to be preferred—*Fidei commissa *and Trusts as known to English Law—Difference between.*

Where there is doubt as to whether a *fidei commissum* has been created, that construction should be preferred which will pass the property unburdened, but, if the language of the will is such as to show clearly an intention to create a *fidei commissum* mere difficulty of construction will not prevent its being upheld. Doubt as to whether a valid *fidei commissum* has been created includes such doubt as to the identity of the beneficiaries as will prevent their ascertainment by a Court of law.

Differences between *fidei commissa* and English Trusts pointed out.

Their Lordships' Judgment was delivered by

LORD THANKERTON.—This appeal arises out of an action of ejection by the first two respondents against the appellants and the other four respondents. The action was dismissed by a judgment and decree of the District Court of Colombo, dated the 23rd March, 1942, which were set aside by a judgment and decree of the Supreme Court of the Island of Ceylon, dated the 26th May, 1944, whereby decree of ejection and for damages were granted in favour of the first two respondents, by a majority of three Judges to two.

The question at issue arises on the proper construction of the will, dated the 12th December, 1872, of one Isboe Lebbe Idroos Marikar, who died on the 8th May, 1876, and whose said will was admitted to probate on the 29th May, 1876.

*P.C. Appeal No. 39 of 1945. 21st January, 1946.

The relevant portions of the will are as follows :—

"I do hereby will and desire that my wife Assenia Natchia, daughter of Seka Marikar, and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Slema Lebbe, Adbul Ryhiman, Mohamadoe Usboe, Amsa Natchia and Savia Umma, and my father Uduma Lebbe Usboe Lebbe, who are the lawful heirs and heiresses of my estate shall be entitled to and take their respective shares according to my religion and Shafie sect—to which I belong, but they nor their heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens belonging to me at present or which I might acquire hereafter, and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only that they may receive the rents, income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized, attached or taken for any of their debts or liabilities, and out of such income, produce and rents, after defraying expense for their subsistence, and maintenance of their families the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated, but neither the executors herein named nor any Court of Justice shall require to receive them or ask for accounts at any time or under any circumstances, except at times of their minority or lunacy."

I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along with the executors herein named three competent and respectable persons of my class and get the moveable and immoveable properties of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions."

The testator was survived by his widow and the seven children named in the will; his father had predeceased him, but an eighth son, Abdul Hameed, had been born after the date of the will, and also survived the testator. The parties are agreed that the case should proceed on the footing that the will applied to Abdul Hameed, as if he had been named by the testator along with his other children in the will.

The moveable and immoveable estates of the testator were duly divided as directed in the last clause of the will, and by deed dated the 19th February, 1878, the then surviving executor conveyed to Abdul Hameed, subject to the trusts and conditions of the will, which were repeated *verbatim* in the deed, the properties which are the subject-matter of the present suit, as Abdul Hameed's share of the immoveable properties of the testator. Abdul Hameed died on the 20th July, 1931, and the appellants are the only two of his children who survive. The 3rd, 4th, 5th, and 6th respondents are grandchildren of Abdul Hameed, children of a deceased sister of the appellants.

On the 15th May, 1931, Abdul Hameed had executed a mortgage of the properties now in suit in favour of one Peter de Saram in consideration of a loan of Rs. 30,000. Peter de Saram subsequently brought an action on the mortgage in the District Court of Colombo against the legal representative of Abdul Hameed, and, on Peter de Saram's death on or about 23rd April, 1937, the present first two respondents continued the action as substituted plaintiffs, and, on the 26th November, 1937, the Court entered a hypothecary decree in their favour. At the sale pursuant thereto the property was bought by the first two respondents, and a conveyance was executed in their favour by the Secretary of the District Court on the 7th July, 1938. Their right to possession of the property having been disputed by the descendants of Abdul Hameed on the ground that it was the subject of a *fidei commissum* under the will of the testator, and that Abdul Hameed had no interest in the property which he was capable of mortgaging except an interest which terminated on his death, the first two respondents instituted the present action on the 30th January, 1931, for a declaration that they were entitled to the property in suit, for decree of ejection and for damages.

The main question in the appeal is whether under the will a valid *fidei commissum* of the property in suit was created, which disabled Abdul Hameed from mortgaging any interest in the property after his death, or whether Abdul Hameed had an absolute interest in the property, which has become vested in the first two respondents by sale. The appellants maintain that a valid *fidei commissum* was created by the will, which the first two respondents deny, maintaining (*a*) that the terms of the will do not suffice to create a valid *fidei commissum*, (*b*) that the terms of the will, at best, rather contemplate the creation of a trust, which would contravene the rule against perpetuities, than the creation of a *fidei commissum*, and (*c*) in any

event, that uncertainty as to ascertainment of the beneficiaries and the time of the vesting of their interests renders it impossible to give effect to any *fidei commissum*.

This particular will has already been the subject of judicial construction in four cases, in the first three of which it was held that it created a valid *fidei commissum*; in the fourth case though it was decided on a different point, Soertz, J., on a review of the previous decisions, found difficulty in agreeing with them, and, if it had been necessary would have asked for reconsideration of them by a full bench. In the present case, the District Judge, though he appears to have favoured a different view, felt bound by the previous decisions to decide in favour of a *fidei commissum*. On appeal by the first two respondents, an order was made for a hearing before five judges, and on the 26th May, 1944, the appeal was allowed by a majority of three Judges (Howard, C.J., Soertz, J., and Hearne, J.) to two (Keuneman, J. and Wijeyewardene, J.), and judgment was entered for the first two respondents. In view of that diversity of opinion, their Lordships find unnecessary to refer to the four earlier cases, as Wijeyewardene, J., was a party to the decision in the third case, and Soertz, J., as already stated, was the judge in the fourth case, and also because it appears that the terms of the will, as they were submitted to the Court in at least the first three cases, included the words "issues or heirs" in the clause prohibiting alienation, and there is no mention of issue in the will as submitted in the present appeal.

Howard, C.J., held (*a*) that there was a doubt whether there was or was not a prohibition in perpetuity against alienation, (*b*) that there was no certainty with regard to the beneficiaries, the class being too wide for ascertainment and too vaguely described, for which reason alone the learned Judge held that it had not been established that the testator intended to create a *fidei commissum*, and (*c*) that he agreed with the opinion of Soertz, J., that there was a further difficulty with regard to the time of vesting. Soertz, J., held (*a*) that there was a failure to designate or indicate sufficiently the recipients of the testator's bounty, and that the attempted *fidei commissum* failed *in limine*, (*b*) that the time of vesting was also wrapped in similar doubt, and (*c*) that the language of the will rather contemplated a perpetual trust, which would fail because of the rule against perpetuities and also because of the uncertainty as to the beneficiaries and the time of vesting. Hearne, J., arrived at the conclusions (*a*) that it was impossible to hold from the language of the will that the testator intended to create a *fidei commissum*, (*b*) that, if he did, he failed to achieve his object, the requisites of a valid *fidei commissum* not having been satisfactorily set out, (*c*) that the wording of the will, and the effect of its provisions strongly suggested an attempt to create a trust, in which attempt, if it was consciously made, the testator failed.

Of the two learned Judges who formed the minority, Keuneman, J., held (*a*) that the intention of the testator to create a *fidei commissum* had been expressed with sufficient clearness, (*b*) that the will showed an intention to benefit three classes of beneficiaries, *viz*., the devisees, their children and their grandchildren, that the testator devised the immoveable property to the devisees, burdened with a *fidei commissum* in favour of their children and grandchildren in successive generations; and that the *fidei commissum* was to become operative on death in each case, and (*c*) that the interest given to the devisees more closely resembled the interest of a fiduciary as known to the Roman-Dutch law than the interest of a trustee as known in England, the occurrence of the word "trust" in the will being inclusive, and that he was not disposed to accept the argument that the will created a trust as known in England. Lastly, Wijeyewardene, J., held that by the opening clauses of the will the *plena proprietas* was given to the immediate devisees, a prohibition against alienation being then imposed, such burden being in favour of their heir or heirs and grandchildren, the grandchildren being the ultimate beneficiaries, the clause as to the rents, income and produce being merely explanatory of the preceding clauses, and that by these clauses a valid *fidei commissum* was created, there being nothing in the subsequent clauses to prevent the Court from holding in favour of a *fidei commissum*—in particular, the clause as to disposal of the surplus rents, produce

and income not being legally binding on the devisees; the learned Judge further held that the testator should not be taken to have intended to create an English trust.

The authorities as to the rules of construction which apply to the present question are fully quoted by the learned Judges of the Supreme Court, and their Lordships, do not find it necessary to repeat them, but the following general principles may be derived from them. In the first place, where there is doubt whether a *fidei commissum* has been created, that construction should be preferred which will pass the property unburdened, but, if the language of the will is such as to show clearly an intention to create a *fidei commissum*, mere difficulty of construction will not prevent its being upheld. Doubt as to whether a valid *fidei commissum* has been created includes such doubt as to the identity of the beneficiaries as will prevent their ascertainment by a court of law. However difficult their application may be in a particular case, these general rules of construction appear to be well established.

In the first place, their Lordships will dispose of the suggestion that the will suggests an attempt on the testator's part to create a trust as known in England. Their Lordships agree with Wijeyewardene, J., that the use of the word " trust " in the will is quite inconclusive, as it is as commonly used by writers in relation to *fidei commissa* as to the English type of trust. In the opinion of their Lordships the leading clauses of this will are typical of a *fidei commissum*, and are inconsistent with the structure of an English trust. The main differences between *fidei commissa* and English trusts are correctly set out, in the opinion of their Lordships, in Professor R. W. Lee's Introduction to Roman-Dutch Law (3rd Ed., 1931) at page 372, *viz.* :—

" 1. The distinction between the legal and the equitable estate is of the essence of the trust; the idea is foreign to the *fidei commissum*. (2) In the trust, the legal ownership of the trustee and the equitable ownership of the beneficiary are concurrent, and often co-extensive; in the *fidei commissum* the ownership of the *fidei commissary* begins when the ownership of the fiduciary ends. (3) In the trust the interest of the beneficiary, though described as an equitable ownership, is properly '*jus neque in re neque ad rem*', against the *bona fide* alienee of the legal estate it is paralysed and ineffectual; in the *fidei commissum* the *fidei commissary*, once his interest has vested, has a right which he can make good against all the world, a right which the fiduciary cannot destroy or burden by alienation or by charge."

Professor Lee adds a fourth difference, which is not material here.

In the opinion of their Lordships the learned Judges, who formed the majority, have not given sufficient weight to the language of the leading clause, under which the testator's heirs and heiresses according to the Mahomedan law are to be entitled to and to take their respective shares under the law. In the opinion of their Lordships, the terms of the clause, along with the inclusion of the moveable estate in the devise, which the devisees take absolutely, point clearly to a devise of the *plenum dominium* of the immoveable estate to the devisees, subject to the restrictions so far as binding under the law of Ceylon, and make clear that there is not any attempt to constitute a trust as known to the law of England, but that there is an attempt to constitute *fidei commissa*, and the last clause which directs the separate ascertainment, after the death of the testator, of the shares to which the heirs and heiresses are entitled, points to a separate *fidei commissum* in the case of each devisee. The present case relates to the share of Abdul Hameed, which was so ascertained, and conveyed to him.

In order to ascertain, if possible, who are the fiduciaries and who are the *fidei commissarias*, it is convenient to read the next two clauses together:—

"But they nor their heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens belonging to me at present, or which I might acquire, and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses only . . . . "

One of the learned Judges relates the final word " only " to the succeeding clause, but, while their Lordships do not think that it matters very much, they take the view that it more naturally qualifies the antecedent clause. Bearing in mind that the Mahomedan law only includes the nearest generation when referring to heirs,

their Lordships are clearly of opinion that the words " they nor their heirs " in the clause prohibiting alienation cover two generations only, *viz.*, the devisees and their heirs, and that there is no room for the suggestion that the prohibition may be construed as a perpetual one. In the next clause, the word " they " clearly relates to the immoveable property, and the beneficiaries, in the opinion of their Lordships, relate to the third generation in the case of all the devisees, the testator's wife, as well as his children ; the fact that the first words " grandchildren of my children " might have been satisfied by the words which follow—" grandchildren of my heirs and heiresses "—does not materially affect the construction of the clause as stated by their Lordships. So far, their Lordships find language in the will apt for the constitution of a valid *fidei commissum*, and a sufficient statement of the beneficiaries and the benefits to be taken by them.

It is suggested that the succeeding clause as to the rents, income and produce of the immoveable property makes it difficult to uphold the creation of a valid *fidei commissum*, but their Lordships are of opinion that it is not legally binding on the fiduciaries, to whom alone it relates and is therefore of a precatory nature ; in this they agree with the views expressed by Keuneman and Wijeyewardene, JJ. As regards the construction of the clause, their Lordships are of opinion (*a*) that it applies to the devisees and their heirs, who are referred to in the clause which prohibits alienation, (*b*) that it relates only to surplus rents, income and produce, and to their incumbrance, and (*c*) that the purchase of the surplus lands " for the benefit and use of their children and grandchildren as hereinbefore stated," sufficiently clearly expresses the desire that the surplus lands should be held on the same terms as the original shares of the testator's immoveable property were to be held. It is clear on the whole terms of the will that each of the fiduciaries was only to take an interest in his share during his life. The next clause as to a demand for accounts, whether effective or not, cannot affect the valid creation of a *fidei commissum.*

Finally, their Lordships agree with Wijeyewardene, J., that such questions as whether the share held by Abdul Hameed as fiduciary would pass on his death to his heirs as a joint *fidei commissum* or as separate *fidei commissa* are not destructive of the creation of a valid *fidei commissum* by the will, but are questions as to devolution of the property which commonly arise for settlement by the Court on the proper construction of the will. Their Lordships agree with the reasoning of the learned Judge on this point.

It follows that in the opinion of their Lordships Abdul Hameed took his share of the immoveable property subject to a valid *fideicommissum*, and that, accordingly, Abdul Hameed could not mortgage any interest in the property after his death, and that the first and second respondents' suit fails and should be dismissed.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the Supreme Court should be set aside, and that the judgment and decree of the District Court should be restored. The first and second respondents will pay the appellants' costs of the appeal and their costs before the Supreme Court.

Solicitors for Appellants : *Freeman and Coolie.*

Solicitors for Respondents : *Burchells.*

H.J.U./V.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD MACMILLAN, LORD WRIGHT, LORD DU PARCQ, LORD JUSTICE MORTON AND SIR JOHN BEAUMONT.

Rani Provabhati Saheba and others .. *Appellants**

v.

The Secretary of State and others .. *Respondents.*

Fishery rights—'Adjuncts' of a river fishery—Requisites to constitute—Determination of rights in regard to—Rules governing—Practice—Case of prescriptive possession—If can be allowed to be raised for the first time in the Privy Council.

The alterations in the course of Indian rivers due to the conformation of the land and the alternate extremes of dry and rainy seasons affect the fishing rights in them. In general the fishing rights in a river follow the river and the subsidiary fishing rights in waters associated with a river fishery, or "adjuncts" as they have come to be called, may vary with the changes in the river itself. In order that the fishings in any waters may be claimed as an "adjunct" of a river fishery these waters must be in continuous connection with the river throughout the year in the dry season as well as in the wet season. Waters which cease to be continuously connected with the river cease to be "adjuncts" of it and the fishings in such disconnected waters cease to be part of the river fishery, and pass to the owners of the solum. On the other hand the owners of a river fishery acquire right to the fishings in new areas which come to be covered with waters connected with the river and the owners of the submerged solum must recognise the creation of such fishing rights within their estates. Connections between the existing sheets of water and the river may also open or close with consequent effects upon the fishing rights. There may thus be loss and gain as between the owners of the solum and the owners of the river fishery as the physical circumstances alter.

On a question whether leave could be granted to a respondent to make out a case of prescriptive possession for the first time at the hearing of the appeal before the Privy Council,

Held, that no such case was made on the record, and no such issue was formulated and the High Court had not dealt with it. In these circumstances, this plea cannot be allowed to be taken at this stage. Possession is a matter of fact and the appellants might well complain that if they were to meet a case of prescriptive possession they should have had notice of the precise period of possession and of the acts of possession on which the respondent proposed to rely.

J. M. Pringle, K.C. and *T. B. W. Ramsay* for Appellants.

H. U. Willink, K.C. and *J. M. Parikh* for Respondents.

Their Lordships' Judgment was delivered by

LORD MACMILLAN.—This appeal comes before their Lordships from the Calcutta High Court in a suit in which the respondent, the Secretary of State for India in Council, is the plaintiff. He claims a decree in his favour declaring his title to seven jalkars or fisheries which in his plaint he describes as "component parts" of his fishery known as Jalkar Gangapath Islampur (southern portion). His claim was originally to nine jalkars but has been restricted to seven.

It is not disputed that the respondent as in right of the southern portion of Jalkar Gangapath Islampur is entitled to the fishings in some fifty miles of the river Ganges, which is a public navigable river. Nor is it disputed that he is entitled to all subsidiary fishings which the law recognises as "adjuncts" of his fishery in the Ganges. But it is denied by the appellants, who are certain of the original defendants in the suit, that the respondent has any right to the seven jalkars now claimed by him whether as "adjuncts" of his fishery in the Ganges or under any other title. The appellants who have contested the respondent's claim before their Lordships are the proprietors of an eight annas share of Pergunnah Ekbarabad, within whose limits the disputed fisheries lie, and they maintain that to the extent of their proportion the disputed fisheries belong to them as the owners of the underlying solum. The Secretary of State succeeded in his claim both before the Subordinate Judge and in the High Court.

A description of the situation and geographical features of the jalkars in question is necessary in order to appreciate the problem. The Pergunnah Ekbarabad is

* P.C. Appeal No. 27 of 1944. 25th March, 1946.

an estate lying between a river known as the Bhagirathi and a portion of the stretch of the Ganges in which the respondent admittedly owns the fishings. The Bhagirathi was originally not an independent river but was a diversion of part of the waters of the Ganges which it rejoined lower down. Subsequently, and at any rate before 1867, the Bhagirathi at its upper end ceased to be connected with the Ganges and became an independent river. Instead of flowing directly into the Ganges, as it originaly did, it became united with another river called the Pagla and the united stream flows into the Mahananda river which in turn joins the Ganges. The Bhagirathi was at one time navigable but has ceased to be so. One of the seven jalkars claimed by the respondent is in a three-mile stretch of the Bhagirathi where it borders Pergunnah Ekbarabad some distance above its junction with the Pagla. Another of the disputed jalkars is in a channel between the Bhagirathi and the Pagla. The five other jalkars are bils, that is, ponds or swamps. Four of them lie at distances of from half a mile to two miles from the Bhagirathi with which in the rains they are connected by channels or ditches and the fifth is connected by a channel with the Pagla.

The capricious habits of Indian rivers, due to the conformation of the land and the alternate extremes of dry and rainy seasons, result in frequent changes in their courses. Areas at one time covered with water dry up and areas of previously dry land become submerged, while connections with associated sheets of water open or close. Such alterations necessarily affect the fishing rights and have given rise to difficult legal questions which have been much litigated. It may now be taken as settled that in general the fishing rights in a river follow the river and that subsidiary fishing rights in waters associated with a river fishery, or "adjuncts" as they have come to be called, may vary with the changes in the river itself. In order that the fishings in any waters may be claimed as an "adjunct" of a river fishery these waters must be in continuous connection with the river throughout the year, in the dry season as well as in the wet season. Waters which cease to be continuously connected with the river cease to be "adjuncts" of it and the fishings in such disconnected waters cease to be part of the river fishery, and pass to the owners of the solum. On the other hand the owners of a river fishery acquire right to the fishings in new areas which come to be covered with waters connected with the river and the owners of the submerged solum must recognise the creation of such fishing rights within their estates. Connections between existing sheets of water and the river may also open or close with consequent effects upon the fishing rights. There may thus be loss and gain as between the owners of the solum and the owners of the river fishery as the physical circumstances alter. Such their Lordships find to be the law as established after some fluctuations by the reported cases including the decision of this Board delivered by Lord Sumner in *Srinath Roy* v. *Dinabandhu Sen*[1].

Now it is manifest from a perusal of the respondent's plaint that he came into Court with a case based on the contention that he was entitled to the seven disputed jalkars as "adjuncts" or, as he put it, "component parts" of his fishery Jalkar Gangapath Islampur, that is of his fishery in the Ganges. Indeed in a petition which in the course of the proceedings he presented to the Court he expressly stated that "the jalkars in suit have been claimed in the suit as component parts of the Jalkar Gangapath Islampur" and asked leave to put forward an alternative argument should it be found that the jalkars in suit "can no longer be considered as connected with the Ganges". This shows the meaning which in his plaint the respondent attached to the words "component parts". When the respondent's averments are examined it appears that he nowhere claims that the water channel between the Bhagirathi and the Pagla or any one of the five bils is now connected throughout the year with the Ganges. On the contrary he avers only that they "remain connected with the Ganges for about three months every year during the rainy season". If these six jalkars, as he avers, are connected with the Ganges

1. (1914) 27 M.L.J. 419 : L.R. 41 I.A. 221 : I.L.R. 42 Cal. 489 (P.C.).

only for part of the year, the respondent cannot succeed in his claim to them as "component parts" or "adjuncts" of his fishery in the Ganges, in view of the law as their Lordships have above defined it. As regards the three mile stretch of the Bhagirathi river the respondent puts his case in his plaint somewhat differently. He states that at its source the Bhagirathi is connected with the Ganges only for about two-and-a-half months in the year in the rainy season. This would not make the fishings in the Bhagirathi an "adjunct" of his fishery in the Ganges. But he goes on to say that the Bhagirathi remains connected with the Ganges throughout the year because its waters flow into or ultimately find their way to the Ganges. This will plainly not do. The Bhagirathi is now a tributary not a diversion of the Ganges and it is not even a direct tributary, as has been already explained. Once it is ascertained that the Bhagirathi is an independent tributary of the Ganges the fishings in it cannot in law be regarded as an "adjunct" or component part of the fishery in the Ganges. Counsel for the respondent very properly admitted that he could not contend that a right of fishing in a river included the right to fish in all its tributaries as "adjuncts". Such a contention if admitted would lead to manifest absurdity.

The result is that the respondent's case as tabled on record necessarily fails and that the judgment of the Subordinate Judge in his favour, so far as based on his finding that "the water of the Jalkars in dispute is still the water of the Ganges", although none of them is connected throughout the year with the Ganges, is erroneous.

The Subordinate Judge proceeds, however, to discuss the question of the respondent's title to the jalkars not as "adjuncts" of his fishery in the Ganges but as included in the grant of Jalkar Gangapath Islampur to his orginal predecessor. The respondent's plaint does not set out his title or deduce it through its transmissions to himself, but as the matter has been fully dealt with both by the Subordinate Judge and by the High Court, their Lordships have thought it right to hear a full argument on the subject and to express their judgment upon it. Here reference may again be made to the petition presented to the Court on behalf of the respondent in which he asked leave to argue another "aspect of the case", namely, that if it should be found that the jalkars in dispute were component parts of Jalkar Gangapath Islampur "at some point of time in the past and consequently the plaintiff had right to them then, the plaintiff's right and claim to them should be upheld and he should get a decree in respect of them unless his claim is found to have been barred by limitation or his title extinguished by adverse possession". The defendants objected to the respondent "making a different case from that made in the plaint". What the Subordinate Judge did on the respondent's application does not appear, but he evidently allowed the question of title to be fully developed before him, although it scarcely seems to be the other "aspect of the case" referred to in the respondent's petition. Even on second thoughts it does not seem to have occurred to the respondent to make a case either that the jalkars in dispute were in express terms included in the title of the respondent's authors or that the respondent had acquired a prescriptive right to them by possession. The only allegation in the plaint as to possession is that the jalkars "were in peaceful possession of the plaintiff's predecessors-in-interest till about 40 years ago", since when the defendants have "been in wrongful possession of the same".

The Subordinate Judge after hearing evidence and examining the documents came to the conclusion that the respondent had been able to prove "long possession from 1806 or 1807 to 1888" and that "apart from the question of title the plaintiff is entitled to succeed on the strength of long possession," but that "on a consideration of the documentary evidence . . . . there is no doubt that the disputed jalkars were included in the Jalkar of Hoolas Chand [*i.e.*, the Jalkar Gangapath Islampur] created by the permanent settlement, if not before that".

When the case reached the High Court on appeal the learned judges delivered a judgment discussing at considerable length the physical characteristics past and present of the jalkars in question and the law with regard to "adjuncts" of a

river fishery. Rather surprisingly, they state that in his plaint " the plaintiff made the definite case that these waters are component parts of the Jalkar Gangapath Islampur " but that he did not thereby mean to claim that he had a right to the fishings in them as " adjuncts " of the river Ganges in the legal sense. They point out that the jalkars " cannot be considered as adjuncts because the connection directly or indirectly with the Ganges is not throughout the year " ; and therefore they seem to infer that the plaintiff did not claim them as " adjuncts " but as parts of the same river system, whatever precisely that may mean. Passing from this topic apparently without pronouncing upon it, the learned Judges go on to say that the case in their judgment depends upon two questions, namely, " (1) the nature and extent of the right of the Crown to grant a several fishery to a private individual, and (2) the extent of the grant actually made by it in this case."

Their Lordships see no reason to differ from the view of the High Court that there is nothing to prevent the Crown when making settlements of land, from severing fishery rights in waters from the right to the subjacent soil or from granting the fishing rights to one private individual and the subjacent soil to another private individual. This being accepted, the question is next considered of the respondent's title to the seven jalkars in dispute, not as "adjuncts" of Jalkar Gangapath Islampur but as subjects of grant by themselves. Waiving the pleading point that the respondent has nowhere set out on record and deduced his title their Lordships have examined the documentary evidence on which the learned Judges of the High Court found that the seven jalkars must be held to have been included as substantive items in the respondent's title.

The burden is upon the respondent to make out his title. He claims to be the successor in title of the grandmother of one Hoolas Chand. To this lady in pre-British times Nawab Aliverdi Khan in the middle of the eighteenth century made a grant of several fishery in the Ganges extending from Pointy to Sooty and designated Jalkar Gangapath Islampur. The fishery was then undivided and it was not until 1870 that it was divided into a northern and a southern portion. The grant was confirmed to the father of Hoolas Chand. Neither the original sanad nor the confirmatory sanad is forthcoming. The respondent is thus under the initial disadvantage of having to rely on secondary evidence to prove the contents of the original grant to his predecessor. The transmission to the respondent of the grant, whatever it included, is sufficiently traced.

The first document is a letter of 2nd October, 1789 from the Collector of Bhagalpur requesting instructions for the preparation of the Decennial Settlement. In his letter he purports to give " a brief account of Gungapat Islampore." He states that " the talook so called is a fishery on the Ganges extending from Pointy to near Sooty with one village in hand," was given in farm by the Nawab to one of his female domestics and is now held by her grandson Hoolas Chand. This was the original undivided fishery. The respondent can derive no aid from this document, and so far as it goes it is against his contention for the fishery is simply described as " on the Ganges " and while a village is mentioned as going with the fishery there is no mention of any other separate items or parcels. The Collector was directed to settle with Hoolas Chand who executed on 15th November, 1790, a Kabuliat of " Pargana Gangapath Islampur " without mention of anything more.

On 25th October, 1797, Hoolas Chand made an application to the Government in which he stated that the sanad granted to his father had been destroyed by a fire in his house. He described the subject of grant in the sanad as " Zemindary Mehal Perganah Gungapath Islampur . . . . within the boundaries specified below within the land of all Zemindars Rahati [still water] Bahati [flowing water] Shikasti [diluviated] Bahati [remaining] Dhobha [pond] and Chharan [deserted river bed]." In an attached schedule of particulars the boundaries of "Jalkar Khas Bahinch [direct fishing]", are stated to be " commencing from Painti [Pointy] to Shibgunge Turtipore [Sooty] with Phandi [branches] . . . the big river." " Ijaradars [lessees] of rahati and behati," [still and flowing waters] are mentioned. Several other rivers with branches are included in the schedule but there is no

mention of the Bhagirathi. After an inquiry the Collector ordered that Hoolas Chand should keep " in his possession the Mehals in the said Pargana as heretofore." From this also the respondent gains no assistance. The seven jalkars now claimed as having been included in the original grant are not named and the references to still and flowing waters, ponds and deserted river beds are in their Lordships' opinion no more than references to the then existing " adjuncts " of the fihsery in the Ganges.

The next document is one to which the High Court attached importance as " valuable evidence ". It is a Dehabandi or return relating to the year 1804-5 made to the Collector of Purnea by a lady, describing herself as Zemindar, of " Mouzahs and Kismats in Pergana Gangapath Islampore " within the jurisdiction of District Purnea." It contains a long list of nearly two hundred jalkars among which are mentioned the seven disputed jalkars. Nothing appears to be known about this lady and counsel for the appellants raised a question as to the correctness of including these fisheries in the District of Purnea, which however it is unnecessary to pursue.

In the opinion of their Lordships, differing from that of the learned Judges of the High Court, this Dehabandi does not advance matters. It does not prove that this long list of jalkars was included expressly in the original sanad. If it is invoked to show that the seven jalkars in dispute were included expressly in the original grant, it is equally evidence that all the other jalkars named in the long list were included expressly in the original grant which is most unlikely, and is not indeed suggested. All that it shows is that this lady in 1804-5 claimed a large number of jalkars as then included in Jalkar Gangapath Islampur but for aught that appears they may at that time all have been " adjuncts " of the river fishery and connected physically with it.

A document of 1838 is said by the High Court to be of materiality. It is an extract from the Rubakari or proceeding in the Court of the Deputy Collector for the District of Malda regarding the Jalkar Pargana Gangapath Islampur. It examines the history to date of the fishery, and states that many of the jalkars included in the collection papers had been encroached upon and engulfed by the big river and cannot be identified and many others have been recently formed but that some 334 jalkars and dead rivers were correctly included and among others the jalkars in dispute. A temporary settlement for one year only was consequently made pending further inquiry. This is no doubt evidence of the jalkars in suit having been " component parts " of Gangapath Islampur in 1838 but it is no evidence that they were so at the date of the original grant or that they are so now and still less is it evidence that these jalkars were specified as items of the original grant. On the contrary it rather supports the view that the subsidiary jalkars were a fluctuating quantity varying with the physical conditions. In 1855 the officiating deputy Collector of Malda sought instructions from the Revenue Commissioner of the Rajshahi Division as to the fresh settlement of the Jalkar Gangapath Islampur. He alleged that the fishery included the fishings in all branches whose communication with the Ganges had become cut off and all beds which might be left by the river in future. " No sooner," he says, " does a branch of the Ganges become separated . . . . from the main stream than the right to fish in it is immediately claimed by the Zemindar whose lands surround the water ; such claims have already been successfully asserted in too many instances." He accordingly suggested proceedings for the protection of the Government's rights, but his advice was not accepted and nothing came of the matter. Several subsequent suits to recover neighbouring jalkars with which this case is not concerned failed. When the Government advertised the fishery estate for sale in 1870 they described it as the southern portion of fishery Gangapath in the River Ganges, Pergunnah Gangapath, extending from south of Rajmehal Road to Soontee and Shibganj Toortee. No separate items were mentioned.

The learned Judges of the High Court find that " the documentary evidence on the record which we have noticed above leads to the conclusion that Pergunnah

Gangapath Islampur comprises the jalkars now in suit. They have not changed their sites, at least there is no evidence to the contrary." Their Lordships find themselves unable to accept this view. Their examination of the documents, with the most important of which they have dealt above, satisfies them that the respondent has failed to discharge the burden upon him of proving that his title includes the jalkars in suit as specific items apart from his general right of fishing in the river Ganges. His title, in their opinion, gives him a right to all the " adjuncts" of his fishery as these may vary from time to time with the physical changes of the river, but does not entitle him to claim the fishing in waters which have ceased to be " adjuncts " of the river. It would be a singular right which entitled the respondent to claim as " adjuncts " the fishings in all newly formed water areas coming into existence in connection with the river, as he may undoubtedly do, and at the same time to retain a right to fishings in waters ceasing to be connected with the river. No precedent was cited to their Lordships of such an anomalous fishery right and it would require very precise evidence to establish such a right as a matter of title.

As a last resort the respondent sought leave to make a case on prescriptive possession apart alike from his case on " adjuncts " and his case on title. No such case is made on the record, no such issue was formulated and the High Court has not dealt with it. Their Lordships in these circumstances declined to allow this plea to be taken before them. Possession is a matter of fact and the appellants might well complain that if they were to meet a case of prescriptive possession they should have had notice of the precise period of possession and of the acts of possession on which the respondent proposed to rely. They could then have directed their evidence to this issue. The respondent has already been permitted to argue a case not made by him in his plaint. Their Lordships cannot permit him at this latest stage to raise yet another case for which he has no record. It is true that a considerable body of evidence was adduced in the course of the case on the subject of possession but this was directed to support the respondent's other pleas and not to establish a separate right founded on prescriptive possession.

Their Lordships will humbly advise His Majesty that the appeal be allowed, that the judgments of the Subordinate Judge and the High Court so far as affecting the present appellants be recalled and that the suit so far as directed against the present appellants be dismissed. The appellants will have their costs against the respondent both of this appeal and in the Courts in India.

Solicitors for Appellants : *W. W. Box and Co.*

Solicitor for Respondents : *The Solicitor, India Office.*

H.J.U./V.S. *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT.

Jagdish Narain and others .. *Appellants**

v.

Nawab Said Ahmad Khan and others .. *Respondents.*

Ejectment—Burden of proof of title —Defence need not plead possible defects in plaintiff's title—Merely denial of plaintiff's title—Sufficiency—Lapse of time—If can relieve plaintiff of any part of the burden of proving his title—Evidence Act (I of 1872), section 32—Statement admissible under—Source of information not disclosed—Evidential value.

A plaintiff suing in ejectment could only succeed on the strength of his own title. There is no obligation upon the defendants to plead possible defects in the plaintiff's title which might manifest themselves when the title is disclosed. It is sufficient that in the written statement, the defendant denies the plaintiff's title and under this plea he could avail himself of any defect which such title discloses.

*P.C. Appeal No. 72 of 1944. 12th December, 1945.

No inference can be drawn which might relieve a plaintiff of any part of the burden of proving his title, merely on the ground of lapse of time because though lapse of time may have prejudiced the plaintiff in proving his case, it may well also have prejudiced the defendant in resisting that claim.

The statement of a person admissible under section 32 of the Evidence Act has little evidential value where the source of his information as to the matters which occurred before his birth or in early youth are not disclosed.

Sir Thomas Strangman, *K.C.* and *S. P. Khambatta* for Appellants.

C. S. Rewcastle, *K.C.* and *Robert Ritson* for Respondents.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from the judgment and decree of the High Court of Allahabad dated 29th April, 1941, which modified a decree of the Subordinate Judge of Bareilly dated the 2nd June, 1936.

The plaintiffs (who are respondents in this appeal) claimed possession of two-third parts of Muafi property situate in Mauza Bahra Bikram. Their case was that on the 8th January, 1842, the Government made a grant of the lands in suit in favour of the heirs of Ahmad Khan, who had married Sayara Begum the daughter of Nawab Hafiz Rahmat Khan, who had rendered valuable services to the Government which the Government were minded to reward. The plaint alleged that the grant was made enjoyable in perpetuity generation after generation for the maintenance and help of the heirs of Ahmad Khan, and that each heir was to hold for life only and on the death of an heir the next heir of Ahmad Khan was to take as such heir and not as heir of his predecessor. The plaint further alleged that Ahmad Khan had no male or female issue, and that after his death Musammat Mohammadi Begum was his heir according to Mohammadan Law and entered into possession of his estate.

In the written statement of the several defendants the title of the plaintiffs was denied, and it was alleged that Sayara Begum, the widow of Ahmad Khan, was the absolute owner of the property in suit, and that in 1841 she made a gift of the property to Mohammadi Begum; that in 1854 Mohammadi Begum mortgaged the property, and in 1856 it was sold by the Court in a suit instituted by the mortgagee and was purchased by the predecessors in title of the defendants, and that the defendants and their predecessors have been in possession of the property ever since.

Both Courts in India held that the tenure of the land in suit was as claimed by the plaintiffs, and that each heir of Ahmad Khan held the property for life and on his death the next heir took. These findings have not been challenged before their Lordships, and it follows from such findings that limitation would start to run against an heir from the date when his title accrued on the death of the previous heir.

The Subordinate Judge held that the plaintiffs had proved that they were the heirs of Mohammadi Begum, but that they had not proved that Mohammadi Begum was the heir of Ahmad Khan, and accordingly dismissed the suit.

In appeal the High Court agreed with all the findings of the Lower Court except with regard to the heirship of Mohammadi Begum. The Court held that Sayara Begum as widow of Ahmad Khan, was one of his heirs according to Mohammadan Law and inherited one-fourth of his property, and that it was not proved that Mohammadi Begum was the heir of Sayara Begum; but the Court held it proved that Mohammadi Begum was the heir of Ahmad Khan as to the remaining three-fourths of his property and accordingly they decreed the plaintiffs' suit as to three-fourths of the two-thirds of the property claimed.

The Subordinate Judge had held that the case of the plaintiffs failed because they had not proved that there were no male collaterals in the male line of descent or ascent of Ahmad Khan, or of his father, alive at the death of Ahmad Khan and that, as such male collaterals would succeed as heirs according to Mohammadan Law in preference to Mohammadi Begum, the plaintiffs had failed to discharge

the burden which rested upon them of proving their title. The High Court held that this defect in the title of the plaintiffs had not been pleaded by the defendants, and expressed the view that the Subordinate Judge had made out a case for the defendants which was not foreshadowed in the written statements and was not set up at the trial. Their Lordships, are quite unable to agree with the High Court in this view. The plaintiffs were suing in ejectment, and they could only succeed on the strength of their own title. There was no obligation upon the defendants to plead possible defects in the plaintiffs' title which might manifest themselves when the title was disclosed. It was sufficient that in the written statements the defendants denied the plaintiffs' title, and under this plea they could avail themselves of any defect which such title disclosed.

The following pedigree which was handed in by Counsel for the defendants and admitted by Counsel for the plaintiffs, and which is substantially the pedigree proved at the trial, shows the position of the family of Ahmad Khan :—

PEDIGREE PUT FORWARD BY PLAINTIFFS.

Malik Said Khan — Nawab Hafiz Rahmat Khan

Malik Mohammad Khan — Malik Ahmad Khan d. about 1842 = Mussammat Saira Begam d. 1845. — Nawab Mohammad Umar Khan
(In fact died before 4th January, 1842.)

Ahya Khan (Unmarried). — Ghulam Husain. Khan (Unmarried). — Ghulam Mohammad Khan. — Malik Mohammad Ali Khan predeceased Malik Ahmad Khan

Mussammat Mohammadi Begum d. 1882. = Nawab Mohammad Khan.

Fazal-un-Nisa = Nawab Ali Mohammad Khan d. 1894

Mussammat Munawwar-un-Nisa Begum. Alive. — Nawab Ali Ahmad Khan = Mussammat Mohabbat-un-Nisa Begum
d. 6-1-23.

Mussammat Shaukat Jahan Begum Plaintiff No. 3, Respondent 6. — Nawab Nabi Ahmad Khan Plaintiff No. 2, Respondent 5. — Nawab Wali Ahmed Khan Plaintiff No. 1 (d. 21-5-37, now represented by Respondents 1—4)

Said Ahmad Khan Respondent 1.

It will be observed that Ahmad Khan died about 1842, and his widow died in 1845. Mohammadi Begum was the daughter of one of the four sons of the only brother of Ahmad Khan, so that she was a great-niece of Ahmad Khan. It is in evidence that she was also the informally adopted daughter of Ahmad Khan and his wife. It will further be observed that Mohammadi Begum died in 1882 and that her only son died in 1894 leaving a son and daughter. The daughter, who inherited one-third of her father's property, is not a party to these proceedings. The son, who inherited two-thirds of the property, died in 1923 and the original plaintiffs were his children; they filed their suit in 1934, 11 years and 11 months after the death of their father and so just within the period of limitation. The findings of the Lower Courts that the plaintiffs were the heirs of Mohammadi

Begum as to two-thirds of her property has not been challenged before their Lordships, and the only question which arises for decision is that upon which the Courts in India differed, namely, whether Mohammadi Begum was the heir of Ahmad Khan.

The plaintiffs called two witnesses who gave verbal evidence upon the question. The first witness was Said Ahmad Khan (respondent No. 1 who was the son of the original first plaintiff). He stated that his information about the earlier history of the family was derived from his paternal grandfather who, as stated, had died in 1923. The grandfather can have had no personal knowledge of matters which occurred in 1842, and, as the source of his information as to matters which occurred before his birth or in early youth were not disclosed, his statement, which is admissible under section 32 of the Indian Evidence Act, has little evidential value. Said Ahmad Khan alleged that the father of Mohammadi Begum died during the lifetime of Ahmad Khan and the learned Subordinate Judge found that in that event Mohammadi Begum could inherit as heir of Ahmad Khan only if there were no male collaterals in the male line of descent or ascent of Ahmad Khan, or his father Said Khan, alive at the time of Ahmad Khan's death. This finding has not been challenged. The witness further stated that he did not know whether the father of Ahmad Khan had any, and if so how many, brothers. The second witness called by the plaintiffs was Basityar Khan who also stated that he did not know if Said Khan had any brother. This witness stated that he had seen a written pedigree of the family which was not produced, and this omission detracts from any value which might otherwise attach to his evidence. Their Lordships agree with the view of the learned Subordinate Judge that the verbal evidence produced by the plaintiff does not prove that Mohammadi Begum was an heiress of Ahmad Khan under Mohammadan Law.

In addition to verbal evidence the plaintiffs also relied on certain documentary evidence, and the High Court attached great importance to one document which will be referred to later. Most of the documents produced were relevant on the question of tenure which is not now in question, and these documents need not be noticed. It may, however, be observed that Exhibit "A," which is an extract from the Register *re* transfer of Muafi lands, contains an entry of a Deed of Gift made on the 4th January, 1842, by Musammat Sayara Begum, wife of Ahmad Khan, in favour of Mohammadi Begum described as a daughter of the donor of Muafi land in Mauza Bahra. This suggests that the original possession of Mohammadi Begum was under the Deed of Gift, though from the terms of the tenure as defined by Government on the 8th January, 1842 (Exhibit 14), it follows that Mohammadi Begum's title as donee would terminate on the death of Sayara in 1845.

The document on which the High Court strongly relied in proof of the heirship of Mohammadi Begum is Exhibit 22. This purports to be a copy of an extract from a report regarding Muafi lands under an Order dated 9th January, 1882, taken from the record of Case No. 53/11, relating to enquiry and management of the muafi of Hafiz Rahmat Khan, disposed of on the 29th September, 1882. It relates to the jagir of Pilibhit and states "This Jagir belongs to Ahmad Khan. Mohammadi Begum, heir, came in possession. She sold it to the Nawab Saheb Bahadur of Rampur. The vendee is in possession by virtue of the purchase and Mohammadi Begum is a resident of mohalla Qela in Bareilly." The author of the report is not shown, and the order of the 9th January, 1882, under which it purports to have been made, is not on the record. There is, however, a copy order, Exhibit 21, in case No. 53 directing the record-keeper with reference to the muafi register to make a note against every tract of land, showing whether the tract was then held as muafi or not, and directing that if it was held as muafi it should be ascertained whether the lawful heirs of the persons in whose name it was released were alive or not. On the assumption that the order of the 9th January, 1882, was in similar terms the important point to which the enquiry was to be directed was whether the heir was alive. No doubt, in case of disputed

heirship this would involve an enquiry as to who was the heir, but any such enquiry would involve giving notice to possible claimants so that their case might be adjudicated upon. There is nothing to show that any such notice was given or that any enquiry as to who was the heir of Ahmad Khan was conducted by the officer who made the report. It may well be that, finding that Mohammadi Begum was a member of the family of Ahmad Khan and had been in possession for 40 years, the officer assumed her title as heir. The omission from the report of any reference to Sayara Begum who was certainly one of the heirs of Ahmad Khan, or to the Deed of Gift in favour of Mohammadi Begum, supports the view that no real enquiry was made as to Mohammadi Begum's title as heir. The report does not deal with the property in suit, though the property with which it does deal was probably held on a similar tenure. Their Lordships are unable to attach to the reference in this report to Mohammadi Begum as heir the importance which the High Court attached to it.

It was argued for the respondents that at this distance of time reasonable inferences should be drawn in favour of the plaintiffs and that to require them to eliminate from their pedigree possible heirs whose very existence is not proved is to impose an impossible burden upon them. But it must be remembered that though lapse of time may have prejudiced the chances of the plaintiffs in proving their case, it may well also have prejudiced the defendants in resisting the claim, and the lapse of time is certainly not due to any default on the part of the defendants or their predecessors. The respondents are not so free from criticism. The son of Mohammadi Begum made no effort to support his claim during the 12 years in which he survived her, and his son did nothing during the 29 years in which he survived his father, and the plaintiffs themselves did nothing until the expiration of nearly 12 years from the date when their alleged title accrued. Their Lordships see nothing in the circumstances of the case which would justify drawing any inference which might relieve the respondents of any part of the burden of proving their title. It was argued further that since Mohammadi Begum was left in possession after the death of Sayara Begum when her title as donee terminated, she must be assumed to have remained in possession as heir, and that the fact that no claim was made by any collateral male heir should lead to an inference that no such collateral male heir existed. Their Lordships are unable to accept this argument. It is quite possible that a collateral male heir, not being a member of the immediate family of Ahmad Khan, may have known of the Deed of Gift in favour of Mohammadi Begum, and may not have known of the terms upon which the muafi lands of Ahmad Khan were held under Government grant.

In their Lordships' view the finding of the learned Subordinate Judge that the plaintiffs had failed to prove that Mohammadi Begum was an heir of Ahmad Khan was right.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed, that the judgment and decree of the High Court be set aside and the judgment of the Subordinate Court dismissing the plaintiffs' suit with costs be restored. The plaintiffs must pay the costs of the appeal to the High Court and to His Majesty in Council.

Solicitors for Appellants : *T. L. Wilson and Co.*

Solicitors for Respondents : *Douglas Grant and Dold.*

H.J.U./V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Singara Mudali .. *Appellant**

v.

Ibrahim Baig Sahib .. *Respondent.*

Specific performance—Minor—Contract by natural guardian—Transferee from minors—Enforcement.

The defendant purchased the properties from three minors and their mother subject to an agreement to convey the properties in favour of the plaintiff and his two brothers. In a suit for specific performance the defendant contended that he was not liable to perform the contract inasmuch as there could be no decree for specific performance against the minors who had sold to him.

Held, that the agreement of sale in favour of plaintiff could not be specifically enforced as against the minors and that consequently it was not enforceable against the defendant-transferee.

Ramakrishna Reddiar v. *Kasivasi Chidambara Swamigal*, (1928) M.W.N. 185, relied on.

Zebunniza Begum v. *Mrs. Danaghar*, (1935) 70 M.L.J. 477 : I.L.R. 59 Mad. 942, considered.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A.S. No. 144 of 1944 preferred against the decree of the Court of the District Munsiff of Tirupattur in O.S. No. 400 of 1942.

V. T. Rangaswami Aiyangar and *R. Santhanam* for Appellant.

C. A. Mahomed Ibrahim and *T. S. Santhanam* for Respondent.

The Court delivered the following

JUDGMENT.—The defendant purchased the properties under Ex. P-2 from three minors and their mother Govindammal, subject, no doubt, to an agreement to convey the properties in favour of the plaintiff and his two brothers, Ex. P-1. The plaintiff seeks to enforce sepecific performance of the agreement, evidenced by Ex. P-1 and referred to in Ex. P-2, and is met by the answer that so far as the minors who sold to the defendant are concerned, there could be no decree for such specific performance and therefore the defendant who claims under a purchase from them, is not liable either. The District Munsiff dismissed the suit altogether but, on appeal, the Subordinate Judge granted to the plaintiff a decree for specific performance in so far as the share of Govindammal was concerned, that is, the mother and one of the four vendors. The plaintiff has filed this second appeal, urging that he should have been granted a decree for specific performance of the agreement to convey, or reconvey not only as regards the share of Govindammal, but also as regards the shares of the three minors.

I do not think the plaintiff is entitled to get any more relief than has been awarded to him by the learned Subordinate Judge. The Privy Council held in *Mir Sarwarjan* v. *Fakhruddin Mahommed Chowdhuri*[1], that a contract entered into by the guardian of a minor for the purchase of immoveable property cannot be specifically enforced by him, as he was not bound by the contract and there was no mutuality. In *Ramakrishna Reddiar* v. *Kasivasi Chidambara Swamigal*[2], a Bench of this Court dealing with a case exactly on all fours with the present, held that an agreement to sell the immoveable property of a Hindu minor entered into on his behalf by his natural guardian could not be specifically enforced against him or a subsequent transferee of the properties with notice of the agreement. This decision is binding on me.

But it is urged by Mr. V. T. Rangaswami Aiyangar, the learned advocate for the appellant that a later decision in *Zebunniza Begum* v. *Mrs. Danaghar*[3], by Cornish and Varadachariar JJ., has somewhat shaken its authority because it was there pointed out that a contract entered into on behalf of a minor by a guardian cannot be said to be void but is only voidable. This distinction between "void"

*S.A. No. 797 of 1945. 25th February, 1946.

1. (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232 (P.C.).
2. (1928) M.W.N. 185.
3. (1935) 70 M.L.J. 477 : I.L.R. 59 Mad. 942.

and "voidable" as regards minors' contracts, is not of much importance when we are dealing with a suit for specific performance of an executory contract entered into on behalf of a minor by his guardian. The distinction between the non-availability of the remedy by way of specific peformance and the voidability only of the contract so far as the minor is concerned is pointed out in the same decision. In that very case, dealing with the covenants not to construct buildings, to repair the premises and to grant renewals of leases, the learned Judges hold that specific performance could not be enforced because they are contracts entered into on behalf of a minor on whom personal covenants of the kind cannot be imposed by the guardian. The question whether specific performance should be decreed or not depends not so much on the void or voidable nature of the contract but on its being executory or executed so far as the minor is concerned, and this is apparent from the Full Bench decision in *Venkatachalam Pillai* v. *Sethurama Rao*,[1] where it was held that a contract of resale in favour of a minor could not be enforced by him after he attained majority inasmuch as it was an executory contract and for want of mutuality cannot be enforced by either party even though on the date of the suit, just as in the Privy Council decision, the plaintiff had become a major and had elected to ratify or affirm the transaction that was entered into on his behalf or for his benefit.

Is the defendant affected by this principle of the lack of mutuality when he took his purchase subject to this obligation of reconveyance? What is now sought to be enforced against him is not any contract entered into by him but a contract entered into by or on behalf of the minors, and standing in their shoes the defences open to them would be available to him generally speaking. It may be that as between his minor vendors on the one hand and himself on the other, other questions might possibly arise but they are not relevant for the purposes of this second appeal, which is hence dismissed with costs.

No leave.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Kudiyala Chandrasekhara Varaprasad minor by mother and guardian Swarnakumari Devi .. *Petitioner.**

Madras Civil Rules of Practice—Rule 200—Poundage—Receiver appointed in partition suit—Sale of property in a series of lots to separate purchasers at different times—Poundage is to be calculated separately on the separate amounts realised from the sale of each lot.

Where property is sold in a series of lots to different bidders by a receiver appointed in a partition suit, the poundage is to be calculated separately on the separate amounts realised from the sale of each lot. It cannot be said that the poundage is to be calculated only on the total proceeds of all the sales. Although the division into lots may have been in the exercise of the receiver's own discretion, this does not in any way alter the fact that the sale consisted of a series of separate sales to different parties for different lots.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Tenali, dated 29th August, 1945 and made in I.A. No. 808 of 1945 in O.S. No. 83 of 1944.

M. S. Ramachandra Rao for Petitioner.

The Court delivered the following

JUDGMENT.—This petition under section 115 of the Code of Civil Procedure relates to the levy of poundage by the learned Subordinate Judge of Tenali on the sale of numerous parcels of cloth by the receiver appointed in a partition suit. It was contended in the lower Court that no poundage was chargeable and that in any event it should be calculated only on the gross amount realised by the several

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1. (1932) 64 M.L.J. 354 : I.L.R. 56 Mad. 433 (F.B.).

*C.R.P. No. 22 of 1946. 17th January, 1946.

sales held by the receiver, who sold the property in convenient lots to several purchasers at various times. The learned Subordinate Judge held that poundage was chargeable and he calculated it on the amount of each separate sale and not on the total of all the sales.

In support of the first of these conclusions the learned Subordinate Judge relied on the decision in *Balagurumurthi Chetiyar* v. *Muhammad Ismail*[1] and learned Counsel has not pressed his objection to the levy of poundage.

Dealing with the second point, rule 200 of the Civil Rules of Practice and Circular Orders lays down the procedure for the realization of poundage, and reading this with the rules framed under section 20 of the Court-Fees Act I can see no support for the argument that where property is sold in a series of lots the poundage is to be calculated only on the total proceeds of the sale, and not separately on the separate amounts realised from the sale of each lot. It must be obvious that where property is sold in one lot to one bidder there is only one sale ; but where the property is sold in a series of lots to different bidders and possibly at different times, the disposal of the property consists of a series of separate sales. It is contended that the property was divided into separate lots merely to suit the convenience of the receiver although the Court had included the whole of the property in one schedule in its proceedings directing sale. The gross realizations amounted to more than Rs. 19,000, so it must be clear that if the property had been sold in only one lot the sale could have attracted only one or two bidders ; whereas if the property were divided into a series of convenient lots according to size, quality and description of the goods, more bidders would be attracted and the sale would almost certainly be more productive. Although the division into lots may have been in the exercise of the receiver's own discretion, this does not in any way alter the fact that the sale consisted of a series of separate sales by the receiver to different parties for different lots. The calculation of poundage on each of the sales separately was therefore correct and there is no error of jurisdiction.

The petition is ordered to be dismissed.

K.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Narahari Ramanamma .. *Appellant**

v.

The Official Receiver of Kistna and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), sections 49 and 64—Decree-holder filing affidavit setting out that he holds the decree and the amount due to him as up to the date of adjudication of his debtor—Return of affidavit for re-presentation with decree copy—Re-presentation long afterwards—Admission of claim—Date of "proof" of debt—Dividends paid to other creditors excluding decree-holder—Power to recall and order a re-distribution.

Where a creditor files an affidavit before the Official Receiver in which he sets out that he had obtained a specified decree and the sum due to him up to the date of adjudication of his debtor, he must be deemed to have "proved his debt within the meaning of the Provincial Insolvency Act, though the affidavit is returned with a direction to file the decree copy and there was no re-presentation and admission of the claim till after the approval of the schedule of creditors and dividend by the District Court.

Lakshmi Bai v. *Rukmaji Rao*, (1934) 67 M.L.J. 45 : I.L.R. 57 Mad. 767, applied.

Where during the pendency of an application by such decree-holder (after re-presentation of his affidavit with the decree copy and admission of his claim) praying the Court to amend the schedule of creditors by adding the debt due to him, the final dividend has been paid to the other creditors the Court has ample power to direct the creditors who have so received the dividends to bring back the amount received by them and then to pass an order ordering a redistribution after including the decree-holder among the creditors.

Chandrayya v. *Chinnappan Reddi*, (1941) M.W.N. 489 applied.

Appeal against the order of the District Court, Kistna at Masulipatam dated 22nd July, 1944, in C. M. P. No. 1639 of 1943 in I. P. No. 22 of 1934.

1. (1943) 1 M.L.J. 320.

* A. A. O. No. 45 of 1945. 6th December, 1945.

B. V. Ramanaraju for Appellant.

P. Satyanarayana Raju for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises in the insolvency of one G. Venkatasubba Rao who was adjudged insolvent on 5th January, 1938, in I. P. No. 22 of 1934 on the file of the District Court, Kistna. The appellant is one of the creditors and respondents 2 and 3 are two of the other creditors while the first respondent is the Official Receiver, Kistna. The appellant is the holder of a decree against the insolvent in O. S. No. 466 of 1934 (District Munsiff's Court, Masulipatam). Evidently in pursuance of a notification in the Gazette on 27th April, 1943, calling for proof of debts by the creditors of the insolvent, the appellant filed an affidavit before the Official Receiver on 15th June, 1943, in which he set out that he had obtained a decree in the suit abovementioned on 9th September, 1935, and that a sum of Rs. 2,346-1-6 was due to him up to the 5th January, 1938. A copy of the decree was not, however, filed along with the affidavit. On 6th September, 1943, this affidavit was returned to the appellant with a direction to file the decree copy before the 9th July, 1943. On 9th July 1943, ten days further time was granted for filing the decree and again further time till 26th July was granted. Eventually the Official Receiver directed the appellant to file a petition and affidavit to excuse the delay in re-presentation, and also granted him time to re-present the affidavit along with the copy of the decree till 13th September, 1943. Admittedly the appellant did not re-present this affidavit till 13th December, 1943, when he produced a copy of the decree.

Meanwhile on 16th November, 1943, the Official Receiver declared a dividend at Re. 0-8-5 in the rupee, but excluded the appellant's debt in the calculation of this dividend. He prepared a schedule of creditors from which the appellant was omitted. The schedule of creditors and the dividend were approved by the District Court on 22nd November, 1943.

On 23rd December, 1943, after having re-presented the affidavit with a copy of the decree, the appellant filed in the District Court, Application No. 1639 of 1943 purporting to be under sections 5 and 33 of the Provincial Insolvency Act and other sections of the Code of Civil Procedure, praying that the Court may be pleased to amend the schedule of creditors framed by the Official Receiver and approved and sanctioned by the Court on 22nd November, 1943, by adding the debt due to him. On 31st December, 1943, while this application was pending, the Official Receiver accepted the claim of the appellant to the debt due to him under his decree. However, dividends were paid away to the creditors entered in the schedule approved by the District Court in March and April, 1944. The appellant's application itself was disposed of on 22nd July, 1944, when the District Judge rejected the application. Hence this appeal. The ground on which the learned District Judge dismissed the application was that the appellant was guilty of negligence in not filing the copy of the decree before the Official Receiver in time and by the time the decree copy was filed the schedule had been prepared; the payment of dividends had been ordered to the creditors included in the schedule and that the dividends paid to such creditors could not be ordered to be re-deposited as the law did not permit such a course. The learned District Judge observed however that it was open to the appellant to come in proper time when a second dividend was available and participate in it. When this appeal first came on before me, I felt it necessary to obtain information on certain points and I have since received a report from the Official Receiver furnishing information on some of the points. It is now clear from this report that the dividend that was declared on 16th November, 1943, and approved by the Court on 27th November, 1943, was the final dividend.

The appellant raised several points to support his claim to share in the dividend already declared, but on the view I take on one of the points, I think it unnecessary to express an opinion on the other points, particularly because they would lead to calling for findings from the lower Court on questions of fact.

The contention of Mr. Ramanarasu for the appellant which I think ought to prevail is that under section 64 of the Provincial Insolvency Act he will be entitled to have the benefit of the dividend as he must be deemed to have proved his debt within the time limited (15th June, 1943). Section 33 lays down that where an order of adjudication has been made under the Act, all persons alleging themselves to be creditors of the insolvent in respect of debts provable under the Act shall tender proof of their respective debts by producing evidence of the amount and particulars thereof. Section 49 prescribes the mode of proof. It says:

"A debt may be proved under this Act by delivering, or sending by post in a registered letter, to the Court an affidavit verifying the debt."

Sub-section (2) of that section says this:

"The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The Court may, at any time, call for the production of the vouchers."

Rule 8 of the Rules framed by the High Court is in these terms:

"(1) Unless otherwise ordered all claims shall be proved by affidavit in Form No. 3 in the manner provided in S. 49 of the Act, provided that before admitting any claim the Court may call for further evidence.

(2) The affidavit may be made by the creditor or by some person authorised by him, provided that if the deponent is not the creditor, the affidavit shall state the deponent's authority and means of knowledge.

(3) As soon as may be after proof of any debt is tendered the Court shall by order in writing admit the creditor's claim in whole or in part or reject it, provided that when a claim is rejected in whole or in part the order shall state briefly the reasons for the rejection.

(4) A copy of every order rejecting a claim, or admitting it in part only, shall be sent by the Court by registered post to the person making the claim within seven days from the date of the order."

It is clear that when a creditor delivers or sends by registered post an affidavit verifying the debt due to him, he must be deemed to have proved his debt. The Court no doubt may call for the production of the vouchers or for other information. Thereafter, the Court, if not satisfied with the proof may reject the claim. There is no direct authority on this question, namely, when a debt can be said to be proved. The decision, however, of the late Chief Justice in *Lakshmi Bai* v. *Rukmaji Rao*[1] is apposite and supports the view that I am inclined to take. It was there held that a debt proved within the meaning of the proviso to section 78 (2) of the Provincial Insolvency Act means a debt in respect of which a proof has been lodged and all the requirements of section 49 of the Act fulfilled. The petitioner in that case filed an affidavit as required by sub-section (1) in the approved form verifying the debt and giving particulars of the amount due to him. He did not produce the promissory note under which this amount was due, but intimated that it would be produced later. The learned Chief Justice in dealing with the question whether by the mere act of having filed this affidavit, he must be deemed to have proved his debt observes as follows:

"The question arises here whether a person who has lodged a proof and fulfilled all the requirements of section 49 has 'proved' his debt under the Act. Some assistance upon this point is to be got from the English Bankruptcy Act and the rules which are set out in the second schedule of that Act. Rule 23 deals with the admission or rejection of proofs and the Trustee has to examine every proof and may admit or reject it in whole or in part or require further evidence in support of it. Rules 24, 25 and 28 also speak of proofs. What therefore the English Bankruptcy Act is dealing with is a proof, that is to say, the formal claim lodged by the creditor in the insolvency. The position is similar under the Provincial Insolvency Act; and the Official Receiver after proof has been lodged has either to admit it or reject it and can, if he requires, ask for further evidence in support of the proof. Has a person who has lodged a proof "proved" within the meaning of the Insolvency Act? In my opinion, he clearly has, and that is the meaning to be given to the word 'proved' in the proviso to sub-section (2) of section 78 of the Act."

It was pressed before him that the affidavit filed in that case was not sufficient proof because the details of the debt had not been given and the promissory note had not been produced. The provision in sub-section 2 of section 49 that the Court may at any time call for the production of the vouchers was also relied upon. The learned Chief Justice in overruling these contentions says that:

1. (1934) 67 M.L.J. 45 : I.L.R. 57 Mad. 767.

"Section 49 (2) in my view only deals with the admissibility or rejection of the proof. It is power given to the Official Receiver to call for evidence in support of the proof."

I therefore consider that in this case the appellant must be deemed to have proved his debt within the meaning of the Provincial Insolvency Act. It may also be remarked that eventually his claim was also admitted by the Official Receiver on 31st December, 1943, long before the application itself was disposed of and it is highly regrettable that in spite of this fact the dividends were disbursed in February and March 1944.

The question now is: What should be done to give relief to the appellant. The debt has been proved and the claim has been admitted, but the final dividend has been paid to the creditors included in the schedule and there are no further assets available for distribution. On the finding arrived at by me, it is clear that the diviends have been wrongly paid over to the creditors including the respondents. In such a case as this, I think, the Insolvency Court has ample power to direct the creditors who have so received their dividends to bring back the amounts received by them and then to pass an order ordering a re-distribution after including the appellant among the creditors. In *Chandrayya* v. *Chinnappan Reddi*[1], the power of the Insolvency Court in circumstances analogous to those in the present case has been fully discussed. It is there pointed out that in England the power of a creditor in Bankruptcy to recall dividends paid to creditors whose debts are barred by limitation or paid to them on erroneous principles of law was never doubted. This position is not seriously contested by learned counsel for the respondents.

I therefore allow the civil miscellaneous appeal and grant the application of the appellant to be included among the schedule of creditors. The learned District Judge will direct the creditors to whom moneys had been paid to bring back the amounts so received by them. Then he shall frame a schedule of creditors including therein the appellant and declare a final dividend. As the appellant has certainly been guilty of negligence and has himself to blame for not getting adequate relief in time, he will not be entitled to the costs of the appeal.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

L. Balarama Reddi and others .. *Appellants**

v.

Govinda Reddi .. *Respondent.*

Civil Procedure Code (V of 1908), section 144—Ex parte *decree—Sale in execution*—Ex parte *decree set aside subsequently—Application for restitution—Fresh decree passed in restored suit in the meanwhile—Right to restitution thereafter.*

In execution of an *ex parte* decree for Rs. 948 the properties of the judgment-debtors were sold. Subsequently on an application by the judgment-debtors, the *ex parte* decree was set aside and thereupon they filed a petition under section 144, Civil Procedure Code, for restitution of their property sold in execution. Before, however, this application was decided, the restored suit had been decided and a fresh decree passed for Rs. 798. On a question whether the judgment-debtors were entitled to ask for restitution thereafter,

Held, it must be taken that where an *ex parte* decree has been set aside, the fresh decree that may subsequently be passed has no relation to the *ex parte* decree and cannot be regarded as varying it. Irrespective of the nature of the fresh decree, a judgment-debtor is entitled to recovery of the property sold in execution of the *ex parte* decree. The purchase of immovable property belonging to the judgment-debtor in execution of an *ex parte* decree becomes *ipso facto* void when the *ex parte* decree is set aside. No doubt, before the judgment-debtor can be allowed to recover, he may, on principles of equity, be directed to pay either what has been paid to him from the proceeds of the sale or the decree amount if a decree has been passed.

Appeal against the order of the Court of the Subordinate Judge, Cuddalore, dated 31st August 1944, in A.S. No. 163 of 1943 preferred against the order of the Court of the District Munsiff, Villupuram, dated 18th February, 1942, in M.P. No. 1853 of 1941 in O.S. No. 596 of 1938.

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1. (1941) M.W.N. 489.

* A. A. A. O. No. 59 of 1945. 1st March, 1946.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Appellants.

M. S. Venkatarama Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The question in this civil miscellaneous second appeal is whether the appellants were entitled to restitution of their property sold in execution of an *ex parte* decree which was subsequently set aside. The circumstances were these: In O.S. No. 596 of 1938 in the Court of the District Munsiff of Villupuram, an *ex parte* decree was passed against the appellants for Rs. 948 and costs. In execution of this decree, four items of property were sold for Rs. 1629, one of the items fetching Rs. 1,501 out of the total sum. Subsequently, on an application made by the appellants, the *ex parte* decree was set aside and thereupon the appellants filed a petition under section 144 of the Civil Procedure Code for restitution of the properties sold. Before, however, this application was decided, the suit, O.S. No. 596 of 1938 had been heard on merits and a decree was passed for Rs. 798 and costs. The learned District Munsiff of Villupuram allowed the application for restitution; but on appeal his order was reversed by the learned Subordinate Judge of Cuddalore. It is argued by learned Counsel for the appellants that the order of the District Munsiff was right and that the reasoning of the learned Subordinate Judge, while it might have application to a case in which a decree had been varied on appeal, has no application to a case like the present in which an *ex parte* decree has been set aside and then a fresh decree passed on merits. Where a decree has been varied or reversed within the meaning of section 144 of the Code of Civil Procedure, the principles on which restitution of property sold in execution of the decree which has been varied or reversed is made are well established in this Court by the decision in *Sundararama Reddi* v. *Raghava Reddi*[1], which has been followed by the Calcutta High Court in *Dayal Sarkar* v. *Tari Deshi*[2]. The principle is that restitution will not be ordered merely because the decree has been varied or reversed. It must be shown that the variation is such that if the modified decree had been in force when the sale was held, the sale of either all or part of the property would not have taken place. For the respondent it is argued that as the variation of the decree was only from Rs. 948 to Rs. 798 and as one of the items of property was sold for Rs. 1,501, the sale would have taken place even if the decree ultimately passed had been in force when the sale was held. For the appellants it is argued that this approach to the question is misconceived. There is no question here of a decree which has been varied. The *ex parte* decree was set aside and the decree thereafter passed in the suit was a fresh decree. The appellants are therefore entitled in any event to have their property sold in execution of the decree which has been set aside, restored to them. In support of this contention I have been referred to a decision by a Bench of this Court in *Sobhanadri Apparao* v. *Govindaraju Seetaramiah*[3], and to decisions of the Bombay and Calcutta High Courts reported in *Shivbai* v. *Yesoo*[4], *Raghunandan Singh* v. *Jagdis Singh*[5], *Seth Ummedmal* v. *Srinath Roy*[6]. It is true that in the case decided by this Court no decree other than the *ex parte* decree appears to have been passed at the time when the question of restitution was considered. I do not think, however, that even if a decree had been passed it would have affected the decision. The purchase by a decree-holder of immoveable property belonging to the judgment debtor in execution of an *ex parte* decree becomes *ipso facto* void when the *ex parte* decree is set aside. The decisions of the Bombay and Calcutta High Courts referred to are to the same effect.

Learned Counsel for the respondent has drawn my attention to an observation by Rankin, C.J. in the course of his judgment in *Dayal Sarkar* v. *Tari Deshi*[2], that

"it makes no difference whether the decree of the appellate Court is expressed by saying that the trial Court's decree will be varied by reading Rs. 36 instead of Rs. 49; or whether it is expressed by saying that the trial Court's decree is set aside and in lieu another decree is made for a smaller sum."

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1. (1921) 42 M.L.J. 315.
2. (1931) I.L.R. 59 Cal. 647.
3. (1915) 2 L.W. 1066.
4. (1918) I.L.R. 43 Bom. 235.
5. (1909) 14 C.W.N. 182.
6. (1900) 27 Cal. 810.

On the basis of this observation, it is argued that where an *ex parte* decree has been set aside and a fresh decree is passed, the position is not different from a case where a decree in the original suit has been varied on appeal. I am unable to accept this contention. The observations of Rankin, C.J. which in any case did not relate to an *ex parte* decree cannot affect the authority of *Sobhanadri Apparao* v. *Govndaraju Seetharamiah*[1]. It must, in my opinion, be taken that where an *ex parte* decree has been set aside, the fresh decree has no relation to the *ex parte* decree and cannot be regarded as varying it. Irrespective therefore of the nature of the fresh decree, a judgment-debtor is entitled to recovery of his property sold in execution of the *ex parte* decree. No doubt, before he can be allowed to recover, he may, on principles of equity, be directed to pay either what has been paid to him from the proceeds of the sale or the decree amount if a decree has been passed. In the present case, the appellants say that they are prepared to pay the decree amount and, that being so, it seems to me that the order of the District Munsiff should be restored with the modification that the delivery of the property will be subject to the payment of the decree amount, which will of course include costs, by the appellants within one month from the date of the receipt of this judgment in the lower Court. The mesne profits if any to be paid by the respondent on account of his possession of the property sold under the *ex parte* decree will be worked out separately in these proceedings after the decree amount has been paid.

The result is that the appeal is allowed with costs throughout.

(Leave to appeal is refused.)

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Kalidasa Chetty .. *Petitioner**

v.

Dodda Siddha Chetty and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 89—Deposit in respect of commission short by Rs. 1-4-0 owing to mistake in calculation—Deficiency made up when pointed out, but after expiry of the thirty days—Court has no jurisdiction to excuse the delay.

The responsibility for paying the correct amount into Court as required by Order 21, rule 89, Civil Procedure Code lies with the payer who wishes to have the sale set aside and not with the clerk who receives the lodgment schedule. Where a petitioner had admittedly complied with the provisions of Order 21, rule 89, Civil Procedure Code in making a deposit to have a sale set aside, except for the fact that by mistake he was Re. 1-4-0 short in the amount which he had deposited in respect of the commission, which deficiency was made up as soon as it was pointed, but after the thirty days had expired, on a question whether the delay can be excused ;

Held : The delay cannot be excused either on the ground that the mistake was not that of the payer but of the clerk who received the lodgment schedule who should have pointed out the error or that the small deficiency which led to the delay should be excused on the principle of *de minimis non curat lex* or again on the ground that the amount paid towards poundage could have been appropriated towards the deficiency.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of Coimbatore dated 7th December 1944, in C.M.A. No. 74 of 1944 preferred against the order of the District Munsiff of Kollegal dated 14th June, 1944 in E.A. No. 175 of 144 in E.P.R. No. 282 of 1943 in S.C. No. 38 of 1938.

K. Krishnaswami Aiyangar and *N. C. Raghavachari* for Petitioner.

A. C. Sampath Aiyangar and *S. Krishnamachari* for Respondents.

The Court delivered the following

1. (1915) 2 L.W. 1066.

* C. R. P. No. 953 of 1945. 27th February, 1946.

JUDGMENT.—The petitioner admittedly complied with the provisions of Order XXI, rule 89 in making a deposit to have a sale set aside, except for the fact that by mistake he was Re. 1-4-0 short in the amount which he had deposited in respect of commission. The deficiency he made up as soon as it was pointed out to him, but after the thirty days had expired. The learned District Munsiff excused the delay on the ground that it was due to a *bona fide* mistake. But the learned District Judge of Coimbatore has taken the view that the District Munsiff had not jurisdiction to excuse the delay.

For the petitioner I have been referred to cases decided by the Patna High Court and it has been argued that the delay can be excused either on the ground that the mistake was not that of the payer but of the clerk who received the lodgment schedule who should have pointed out the error, or that the small deficiency which led to the delay should be excused on the principle of *de minimis non curate lex* or again that the amount paid towards poundage could have been appropriated towards the payment of interest, as the limitation of thirty days does not apply to the payment of poundage. The last two contentions are not open to the petitioner in view of the decision of a Bench of this Court in *Kalinga Hebbra* v. *Narasimha Hebbra*[1]. In that case the deficiency was less than three annas. None-the-less it was held that it could not be condoned and that the amount that had been paid towards poundage could not be appropriated to the payment in respect of the sale which was deficient. With respect I should not in any case be able to follow the decision of the Patna High Court in *Nanhu Prasad Singh* v. *Nandan Missir*[2]. The responsibility for paying the correct amount, it seems to me, lies with the payer who wishes to have the sale set aside and not with the clerk who receives the lodgment schedule. It has been suggested that *Kalinga Hebbra* v. *Narasimha Hebbra*[1], is no longer binding in view of the amendment to Order XXI, rule 92. There is no force in this argument as the mistake which led to the depositor paying Rs. 1-4-0 too little in respect of interest was clearly within his control.

In the result, therefore, the petition must be dismissed with costs of the first respondent.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Adiraja Arasarada Kinnyakka Ballal .. *Petitioner**

v.

Badeltu Naranappayya and others .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927), section 78—Scope and nature of an application under—Person objecting to delivery if can question order of appointment of the trustee making the application.

An application for delivery under section 78 of the Madras Hindu Religious Endowments Act i in the nature of an application for execution and it is not open to a person objecting to an applications for delivery made under that section to question the order of appointment of the trustee who has made the application.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of South Kanara dated 24th March, 1945, in O.P. No. 13 of 1945.

T. Krishna Rao for Petitioner.

K. Y. Adiga and *K. P. Adiga* for Respondents.

The Court delivered the following

JUDGMENT :—This civil revision petition arises out of an application under section 78 of the Hindu Religious Endowments Act for delivery of the properties of a temple in South Kanara. The application for delivery under section 78 was opposed by the petitioner who had been a hereditary trustee of the temple, on

1. (1911) 21 M.L.J. 631.
2. A.I.R. 1934 Pat. 246.

* C. R. P. No. 1054 of 1945. 5th March, 1946.

the ground that the Hindu Religious Endowments Board had no jurisdiction to appoint trustees excluding him as the right of appointment of trustees lay in the Jain Committee. The learned District Judge of South Kanara allowed the petition because, in his opinion, as the petitioner had taken no steps to set aside the order of appointment of trustees made by the Board, that order had become final.

It is argued by learned Counsel for the petitioner that he is entitled to raise the question in an application under section 78 because the order of the Board was without jurisdiction. I do not accept this argument. It is perfectly clear that the order of the Board had become final as the petitioner had not taken the appropriate steps to set it aside at the time when the application for delivery was made. An application for delivery under section 78 is in the nature of an application for execution and it is not open to a person objecting to an application for delivery made under that section to question the order of appointment of the trustee who has made the application. In my opinion, the decision of the District Judge is right. This petition is accordingly dismissed with costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Kachikidambi Srinivasa Varadachariar .. *Petitioner**

v.

Sri Manavala Mahamunigal Temple at Thiruvaheendrapuram, by its trustee, P. V. Jayaramulu Naidu .. *Respondent.*

Civil Procedure Code (V of 1908), section 115—Suit tried as an original suit after objection that it should be tried as a small cause suit—Appeal by plaintiff—No question of jurisdiction raised—Revision of appellate decree as being without jurisdiction—Not maintainable.

If a small cause suit is tried as an original suit and then on that basis an appeal is preferred, an application to set aside the appellate decree may be entertained in revision on the ground of its being without jurisdiction.

But where the parties joined issue in the trial Court as to whether the suit should be tried as an original suit or a small cause suit and the District Munsiff found that it should be tried as an original suit and the plaintiff appealed against the decision in the suit but in the appeal itself no question of jurisdiction was raised at all, the circumstances are such that it is not open to the plaintiff to contend in revision that the appellate decree was without jurisdiction.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Cuddalore, dated 14th December, 1944, in A.S. No. 149 of 1944 (O.S. No. 331 of 1941, District Munsiff Court, Cuddalore).

R. Sriramachari for Petitioner.

A. Srirangachari for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was the plaintiff in O.S. No. 331 of 1941, in the Court of the District Munsiff of Cuddalore. He brought the suit to recover money from a temple of which he had been the trustee and a decree was passed in his favour by the District Munsiff for a sum of Rs. 177-1-7. On appeal, however, the decree amount was reduced from Rs. 177-1-7 to Rs. 3-6-7 by the Additional Subordinate Judge of Cuddalore. The suit was decided on questions of fact, but it is argued for the petitioner that he is entitled to maintain a revision petition because the suit which was tried by the District Munsiff as an original suit was in fact a small cause suit so that no appeal lay against the decree of the District Munsiff to the Additional Subordinate Judge.

It has no doubt been held in several cases that, if a small cause suit is tried as an original suit and then on the basis that it was an original suit an appeal is preferred, an application to set aside the appellate decree will be entertained in revision, as the appellate decree was without jurisdiction. The cases cited however so far

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* C. R. P. No. 1100 of 1945. 5th March, 1946.

as I have been able to see, are all cases in which a small cause suit has been tried as an original suit purely by mistake because it was wrongly numbered as an original suit, *e.g.*, *Arunagiri Goundan* v. *Ramaswami Pillai*[1] or has been tried as an original suit because the Judge made a mistake of fact in regard to the extent of his powers to try small cause suits. (Vide *Veeran Kutti Avaru* v. *Joosuf Haji Jaffer Sait*[2].) The present case seems to me to be quite distinct from cases of this type because in the present case the parties joined issue in the trial Court as to whether the suit should be tried as an original suit or a small cause suit and the District Munsiff found that it should be tried as an original suit. Whether he is right or wrong is not now a relevant question, but it may be mentioned that his decision was not without any grounds, as the liability of the temple properties was in question. However that may be, there was an appeal from the decision of the District Munsiff by the plaintiff—an appeal will certainly lie until the District Munsiff's finding that the suit was an original suit has been set aside—and in the appeal itself no question of jurisdiction was raised at all. In these circumstances it does not seem to me that it is open to the petitioner to contend that the appellate decree was without jurisdiction on the ground that the suit should have been tried as a small cause suit. That point was considered by the District Munsiff and, as the petitioner did not take proper steps to have the District Munsiff's decision set aside, he must be assumed to have been right. There is no reason why the petitioner at this stage should be entitled in a petition by way of revision to have the question whether he was right or wrong, considered.

The petition is, therefore, dismissed with costs.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

T. K. Abdul Razack Ravuthar and others .. *Petitioners**

v.

Mahammad Hanif Sahib and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 23, rule 1 (2)—Reasons for allowing withdrawal not given—Material irregularity justifying interference in revision.

Where the District Munsiff merely set out the prayer and reasons of the petitioner (respondent here) for permission to withdraw the suit with leave to file a fresh suit and also the objections of the defendant, but said nothing more than that the petition is allowed, *held*, that failure to state what the defect is or what are the sufficient grounds which have moved the Court to grant permission to withdraw from the suit, is a material irregularity justifying interference in revision by the High Court.

Kanta Singh v. *Bhagwandas*, (1927) I.L.R. 50 All. 199, followed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Udumalpet, dated 24th July, 1945, in I.A. No. 647 of 1945 in O.S. No. 64 of 1944.

D. Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Petitioners.

S. K. Ahmed Meeran for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners are the defendants in O. S. No. 64 of 1944 in the Court of the District Munsiff of Udumalpet. The petitioner in the lower Court was permitted by the Court to withdraw that suit under the provisions of Order 23, rule 1 (2) of the Code of Civil Procedure. The terms in which the order allowing the petitioner to withdraw his suit was passed were these : The District Munsiff first of all set out quite fully the reasons given by the petitioner in support of his prayer for permission to withdraw the suit with liberty to file a fresh suit and then he gave, also quite fully, the objections to this course put forward by the defendants; but, having set out the contentions of both the parties, he said nothing more than "petition allowed."

1. (1941) 2 M.L.J. 537.
2. (1926) 52 M.L.J. 316.

* C. R. P. No. 1459 of 1945. 22nd March, 1946.

It is argued for the defendants-petitioners that it was imperative for the District Munsiff to have given reasons for his order. In my opinion the contention is well-founded. The terms of Order 23, rule 1 (2) of the Code themselves make it clear that the Court must state either what the defect is or what are the other sufficient grounds which have moved it to grant permission to withdraw from the suit with liberty to institute a fresh suit. I have not been shown any authority of this Court on the subject but there is a decision of the Allahabad High Court in *Kamta Singh* v. *Bhagwan Das*[1], in which it was held that reasons for holding that an application under Order 23, rule 1 (2) of the Code should be granted must be stated and that failure to state them amounted to a material irregularity in exercising jurisdiction.

This petition is, therefore, allowed. The order of the District Munsiff is set aside and the application is remanded for fresh disposal according to law and in the light of the observations in this order. The costs of the petition will abide and follow the result of the application.

V.P.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

KR. RM. SM. RM. Ramanathan Chettiar .. *Petitioner**

v.

K. AR. Ramanathan Chettiar *alias* Sethu Chettiar and others .. *Respondents.*

Court-Fees Act (VII of 1870), section 7 (iv-A) (Madras) and (iv-C)—Suit for declaration of a sale deed as sham and nominal—Court-fees whether payable on the sale deed value without its cancellation being asked for—Court-fee payable under section 7 (iv-A) (Madras) of Court-Fees Act.

Where the plaint prayed for a declaration that a sale deed executed by the plaintiff in the name of the first defendant was a sham and nominal transaction and that the first defendant had no title to the property covered by the said sale and therefore asked for an injunction restraining defendants 5 and 6 from bringing the property to sale in execution of a decree on the question whether the court-fee payable by him, should be on the basis of the cancellation of the deed,

Held, that as the plaintiff was a party to the document, the relief prayed for should be its cancellation and not a mere declaration in respect of it, which was the view expressed in *Vellayya* v. *Ramaswami,* (1939) 2 M.L.J. 400=I.L.R. 1940 Mad. 73.

Adinarayana v. *Rattamma,* (1944) 1 M.L.J. 497 and *Krishnaswami* v. *Kuppu Ammal,* A.I.R. 1929 Mad. 478, distinguished.

Therefore court-fee should be paid under section 7 (iv-A) and not under section 7, clause (iv-C).

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Devakottah, dated 14th September, 1944, in C. M. A. No. 2 of 1944 (O. S. No. 247 of 1942, District Munsiff's Court, Devakottah).

R. Kesava Aiyangar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *G. N. Chari* for Respondents.

The Court delivered the following

JUDGMENT.—The question in this civil revision petition relates to the court-fee payable in respect of a suit filed by the petitioner, O. S. No. 247 of 1942, in the Court of the District Munsiff of Devakottah. The substantial plaint prayers are (1) To declare that the sale deed dated 31st July, 1937, executed by the plaintiff in the name of the first defendant and relating to the plaint property is a nominal and sham transaction and that the first defendant had no title to the property covered by the said sale deed and (2) to grant an injunction restraining defendants 5 and 6 from bringing the property to sale in execution of a decree. The petitioner valued his suit for purpose of jurisdiction at Rs. 500 and paid a court-fee of Rs. 56-3-0 under section 7, clause (*iv*) (c) of the Court-Fees Act. The amount for which the sale deed in respect of which the declaration was sought in the plaint was executed is Rs. 6,000 and the District Munsiff held that the value of the suit was more than Rs. 5,000, so that he had no jurisdiction and that court-fee should

1. (1927) I.L.R. 50 All. 199.

* C. R. P. No. 105 of 1945. 14th March, 1946.

be paid as for cancellation of the sale deed. The principal Subordinate Judge of Devakottah confirmed the order of the District Munsiff and dismissed the appeal to him.

The argument addressed to me in support of the petition is that the petitioner was entitled to pay court-fee under section 7 clause (*iv*) (*c*) in respect of his plaint because the allegation in the plaint is that the sale deed, Ex. D-3, is not merely voidable but was a sham and nominal document which was void *ab initio* and which affected no transfer of the property. In my opinion, this contention, having regard to the prayers in the suit, is quite misconceived. The cases to which I have been referred in support of the argument, *Adinarayana* v. *Rattamma*[1], decided by Horwill, J. and *Krishnaswami* v. *Kuppu Ammal*[2], decided by Curgenven, J., are cases in which what was asked for was a declaration of title and the question arose whether it was open to the plaintiff to ask for a declaration of title only and pay court-fee accordingly or whether he had not to ask for a declaration in respect of the cancellation of the deed that stood in the way of his claim to title to the property. It was held in these two cases that if the allegation was that the document was sham and nominal and had not effected a transfer of the property, the document could be ignored and a declaration of title could be asked for without first setting the deed aside. In the present case, however, the Court is asked to declare the sale deed to be a sham and nominal transaction. The question is not whether the plaintiff has not to seek any relief or pay court-fee in respect of the document because he is entitled to ignore it. He has asked for a declaration in respect of the document. The sole question is whether as he was himself a party to the document the relief which he should properly ask for is not for a declaration but cancellation of the document. In my opinion as the plaintiff is a party to the document the relief prayed for should be its cancellation and not a mere declaration in respect of it, which is the view expressed by Wadsworth, J., in *Vellayya* v. *Ramaswami*[3]. In my opinion, therefore, the lower Courts were right in their view that the District Munsiff had no jurisdiction and that Court-fee would be paid under section 7, clause (*iv-A*).

The petition is therefore dismissed with costs, one set to be shared by the first defendant and the Government Pleader.

K.C. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPEL.

Yenikokalva Gorla Narappa .. *Petitioner**

v.

Yenikokalva Chinnareppa and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 39, rule 2 (3)—Suit for permanent injunction—Interim injunction also applied for and granted on plaintiff's undertaking not to do certain acts—Contravention of plaintiff's undertaking—Sufficient ground for punishment with imprisonment—Breach of undertaking was breach of injunction provided in the section.

The present petitioner was himself the plaintiff in a suit for a permanent injunction for restraining the defendants from interfering with the plaintiff's right to take water to his land. During the pendency of that suit, the plaintiff applied by petition for an interim injunction against defendants, and he was granted the same on his own undertaking not "to dig any channel, neither by himself nor by his servants." On a contravention of such an undertaking the defendants complained to the Court, and the lower Court held that the plaintiff had contravened the undertaking and therefore ordered his detention in prison.

Held, that since there was a breach of an injunction, it would be punishable under Order 39, rule 2 (3) Civil Procedure Code. It did not matter whether the undertaking given by plaintiff was regarded as an injunction issued by the Court restraining him from digging a channel or whether his undertaking should be regarded as part of the interim injunction issued against the defendant.

Gurumurthi Chetti v. *Sella Perumal Pillai*, A.I.R. 1936 Mad. 651, applied.

Held further, that as the lower Court maintained its order on the commissioner's report of the absence of a channel in existence, the digging of a channel alleged was not mere repairing but surely a contravention of the plaintiff's undertaking.

1. (1944) 1 M.L.J. 497.
2. A.I.R. 1929 Mad. 478.
3. I.L.R. (1940) Mad. 73=(1939) 2 M.L.J. 400.

* C. R. P. No. 851 of 1945. 6th March, 1946.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Anantapur, dated 28th July, 1945, in A. A. O. No. 6 of 1945 preferred against the order of the District Munsiff, Anantapur, in I. A. No. 337 of 1944 in O. S. No. 60 of 1944.

K. Kuttikrishna Menon and *V. V. Chowdari* for Petitioner.

V. S. Narasimhachar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was the plaintiff in O. S. No. 60 of 1944 in the Court of the District Munsiff of Anantapur, which was a suit for a permanent injunction restraining the defendants from interfering with the plaintiff's right to take water to his land. While the suit was pending, the petitioner applied for an interim injunction against the defendants, and this was granted on an undertaking given by the plaintiff that during the pendency of the suit he would not dig a channel in the defendant's land. From the lower appellate Court's judgment the actual terms of the undertaking were :

"I shall not dig a channel. Neither myself nor my servants shall dig a channel newly for taking water to my land."

The defendants complained that in contravention of this undertaking the petitioner had dug a channel. The District Munsiff held that the petitioner had contravened the undertaking and ordered his detention in a civil prison for a period of seven days. His order was upheld by the District Judge of Anantapur, on appeal.

Two arguments are put forward on behalf of the petitioner : (1) that as there was no injunction against the petitioner, there was no disobedience, and (2) that there was not in fact a violation of the undertaking. The first argument is not so much that there can be no disobedience but that there could be no disobedience to an injunction so as to render the petitioner punishable under Order 39, rule 2, sub-rule (3) of the Civil Procedure Code. I do not accept this contention and I agree respectfully with the decision of Varadachariar, J., in *A. B. Gurumurthi Chetti* v. *Sella Perumal Pillai*[1], to which my attention has been drawn. That was a case of an undertaking given by a defendant, but the reasoning appears to me to apply equally to a plaintiff. It would certainly be surprising, in a case where a temporary injunction has been granted against a defendant subject to an undertaking by the plaintiff, if the defendant could be punished under Order 39, rule 2, sub-rule (3) for a breach of the injunction whereas the plaintiff could not be punished under that provision of the Civil Procedure Code for a breach of the undertaking. In the circumstances of this case, it does not seem to me to matter whether the undertaking given by the plaintiff is regarded as an injunction issued by the Court restraining him from digging a channel, or whether his undertaking should be regarded as a part of the interim injunction issued against the defendant. In either view there would be an injunction, a breach of which would be punishable under Order 39, rule 2, sub-rule (3).

With regard to the second point, the petitioner is not entitled to raise a question of fact in this civil revision petition ; but learned counsel for the petitioner argues that the question is one that can be raised in revision because the lower Court has misconceived the scope of the undertaking. I do not think that this was the case. It appears from the judgment of the District Munsiff that a Commissioner reported that there was no channel on the land and in view of this report, any channel dug by the petitioner must be a contravention of his undertaking. He seems to have maintained that he was only repairing an old channel and not digging a new one. But, as there was no channel in existence at the time of his digging, it is impossible to call, whatever he did, "repairing a channel". He was digging a channel in contravention of his undertaking.

The petition must, therefore, be dismissed with the costs of the contesting respondents.

K.C. *Petition dismissed.*

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1. A.I.R. 1936 Mad. 651.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Panikkathe Kutti Pennu Maruvalamma's son Raghava Mannadiar. *Appellant**

v.

Panikkathe Kutti Pennu Maruvalamma's son Theyyunni Mannadiar. *Respondent.*

Civil Procedure Code (V of 1908), Order 20, rules 12 and 18—Partition suit—Preliminary decree giving no directions as to profits subsequent to date of suit—Mesne profits if can be awarded at stage of final decree—Mesne profits after date of suit—If to be specifically asked for in the plaint.

Practice—Duty of judiciary to keep themselves informed of the current decisions.

The mere fact that a preliminary decree for partition did not give directions as to profits subsequent to the date of suit does not preclude the parties from applying for or the Court from awarding mesne profits by its final decree.

Case-law discussed.

In a partition suit when a plaintiff asks for the establishment of his right to a share in the lands, what is appurtenant to it, namely, a right to account need not be separately asked for and the absence of such specific prayer is no bar to the award of mesne profits.

There is a duty on the part of the judiciary to keep themselves informed of the current decisions of at least their own High Court.

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat in A. S. No. 79 of 1944, preferred against the decree of the Court of the District Munsiff of Alatur in I. A. No. 83 of 1942 in O. S. No. 160 of 1934.

C. Unikanda Menon for Appellant.

D. A. Krishna Variar and *C. Vasudeva Mannadiar* for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff-appellant filed a suit for partition and recovery of a half share in the property. The prayer in the plaint runs thus :

"(*a*) Directing that the properties mentioned in the sub-joined schedule be divided into two equal shares and the properties allotted to one of such sharers be given to the possession of the plaintiff and that the properties belonging to the first defendant's share be made a charge for the Court costs and other amounts due to the plaintiff by the first defendant;

(*b*) Directing the first defendant to pay the plaintiff's costs of this suit with interest; and

(*c*) Granting other reliefs which the plaintiff may pray for in the course of this suit and which the Court might deem fit to allow."

The preliminary decree declared (1) that the properties available for partition are items 1 to 16 and the jenm right only over item 17 of the plaint schedule ; (2) that they are to be divided into two equal shares, the plaintiff getting one share and the first defendant getting the other share. Paragraph (3) dealt with the liabilities. The other paragraphs dealt with outstandings. After the Commissioner prepared a scheme of division, the plaintiff-appellant asked for an account of the profits subsequent to the date of the plaint. In paragraph 9 of the affidavit filed in support of the petition it was stated thus :

"As defendants 1 and 2 are thus holding possession of the properties in the schedule to the decree and enjoying the profit, the plaintiff is entitled to get towards his share 350 paras of paddy per annum with interest 2 per cent from the date of plaint to the date of his getting actual possession of his half share, and accordingly having ascertained the amount, the same may be directed to be paid by the first defendant or if necessary by the second defendant."

One of the objections was that there was no specific prayer in the plaint for profits from the date of suit and the other was that the preliminary decree did not deal with the question of profits and did not contain a direction that the defendants should be liable for profits. The trial Court refused relief on two grounds : firstly that the plaint did not ask for mesne profits subsequent to the date of suit and

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* S. A. No. 1960 of 1945. 27th March, 1946

secondly that as the preliminary decree did not contain any direction about the profits subsequent to the date of suit, the plaintiff was not entitled to ask for it at the stage of the final decree. In support of this proposition, the decision of this Court in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1], was relied upon. On appeal the Subordinate Judge followed the decision in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1], and confirmed the decision of the trial Court. The Subordinate Judge says that the decision in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1] was confirmed in a later decision in *Bapa Lakshmamma* v. *Koteswara Rao*[2] and that it was again referred to with approval in *Subbiah* v. *Kotamma*[3]. When his attention was drawn to a decision of this Court in *Ramaswami Aiyar* v. *Subramania Aiyar*[4] the Subordinate Judge says this:

> "The decision in *Ramaswami Aiyar* v. *Subramania Aiyar*[4], does not really seem to be an authority for the opposite position in any direct way. That case if at all can apply to the present one only by an extension of the principles actually laid down therein. I do not think that in the light of the direct authorities on the question it would be proper to apply the case in *Ramaswami* v. *Subramania Iyer*[4], as laying down a contrary proposition.

In *Ghulusam Bivi* v. *Ahamadsa Rowther*[1] the suit was one for partition and the preliminary decree did not contain any direction as to the profits subsequent to the date of suit. At the stage of the final decree a request was made for enquiry on that matter. The learned Judges referred to two provisions of the Code, Order 20, rules 12 and 18. They first referred to Order 20, rule 12 which applies to a bare suit for possession. It was pointed out that if the decree for possession did not contain a direction for an enquiry into mesne profits an application under Order 20, rule 12 cannot be filed after the decree. Then the learned Judges refer to Order 20, rule 18 which deals with preliminary decrees in partition suits and they applied the principle of Order 20, rule 12 to a case of partition decree under Order 20, rule 18. That no doubt is an authority for the position that if the preliminary decree does not contain a direction for enquiry into subsequent profits, it should not be gone into at the stage of the final decree.

But this case has never been followed by this Court on the question of profits subsequent to the date of suit in partition actions. The Subordinate Judge has not correctly read the later decisions which he says follow the decision in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1]. The first of the decisions referred to by the Subordinate Judge as confirming the principle contained in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1] is *Bapa Lakshmamma* v. *Koteswara Rao*[2]. In that case there was a preliminary decree for partition which did not contain any direction for subsequent profits. At the stage of the final decree, the question was mooted and the final decree directed an enquiry into mesne profits under Order 20, rule 12. Then an application under Order 20, rule 12 was filed. At that stage objection was taken that no enquiry into subsequent profits could be directed. Reliance was placed on the decision in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1] and Cornish, J., while referring to it held that whether the final decree in the case before him was right or wrong, it was binding on both parties as it had been allowed to become final and that therefore the direction as to an enquiry under Order 20, rule 12 was not open to question. Referring to the decision in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1] the learned Judge said this:

> "That principle is not disputed by Mr. Raghava Rao, who appears for the petitioner, but he contends that though the inclusion of mesne profits in a final decree is erroneous as a matter of procedure still the decree having become final and the judgment-debtor having taken no steps to vacate it or revise it, it is not open to any one to go behind that decree in execution. I think that this contention is right. It is not open to an executing Court, if on the face of the decree there is no want of jurisdiction, to question the decree."

Rightly or wrongly the position was conceded by the advocate and it cannot possibly be stated that the principle of *Ghulusam Bivi* v. *Ahamadsa Rowther*[1], was affirmed by Cornish, J. When it is not necessary to deal with the correctness of an earlier decision and the case could be disposed of on another point, judges are not anxious to deal with the correctness of the earlier decision particularly as the learned advocate who appeared for the decree-holder conceded the correctness of the decision in

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1. (1918) I.L.R. 42 Mad. 296.
2. 1931 M.W.N. 846.
3. (1945) 1 M.L.J. 204.
4. (1922) 43 M.L.J. 406: I.L.R. 46 Mad. 47.

Ghulusam Bivi v. *Ahamadsa Rowther*[1] and proceeded to distinguish the case before him on the ground that the final decree had become final. Nor are advocates anxious to question the correctness of earlier decisions when it is not necessary to do so.

The next case relied on by the Subordinate Judge is *Subbiah* v. *Kotamma*[2]. That was a suit for possession pure and simple. The decree for possession did not contain a direction for an enquiry under Order 20, rule 12. Subsequently an application was filed asking for the determination of future mesne profits. The trial Court dismissed the application but on appeal the Subordinate Judge held that the application under Order 20, rule 12 was maintainable. The matter was brought before King, J., and the learned Judge held that as the decree for possession did not contain a direction for an enquiry under Order 20, rule 12, it was not open to order such an enquiry at a later stage. The suit comes to an end with the decree and there can be no further application for such an enquiry. Reference was made before the learned Judge to the decision in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1] and referring to it the learned Judge says this :

> "That ruling deals primarily with a preliminary decree and a final decree in a partition suit but in order to analyse the significance of an order under rule 18 of Order 20, rule 12 is also referred to by the learned Judges ; and it is held that unless the decree in a suit for possession directs an enquiry, there can be no such enquiry ordered in any final decree."

A decision of Varadachariar, J., which seemed to lay down a contrary proposition was then discussed and King, J., held that he would prefer to follow the decision in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1] on this point. If the decision in *Subbiah* v. *Kotamma*[2] had only been scrutinised, the appellate Court would have seen that King, J., followed the decision in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1] only so far as it laid down that in a bare suit for possession where the decree did not contain a direction for an enquiry under Order 20, rule 12, no later application under that rule can be made.

It is rather unfortunate that the Subordinate Judge did not deal with the other decisions of this Court which have taken a view contrary to the decision in *Ghulusam Bivi* v. *Ahamadsa Rowther*[1]. The first of these decisions is *Ramaswami Aiyar* v. *Subramania Aiyar*[3] to which reference has been made by the Subordinate Judge. In that case there was a suit for partition and a preliminary decree was passed. It did not contain any direction as to the enquiry into subsequent profits. At the stage of the final decree, the question was brought up. It was first dealt with by Sadasiva Aiyar and Napier, JJ. and that judgment is reported in *Ramaswami Aiyar* v. *Subramania Aiyar*[3]. There the learned Judges dealt with the argument that as the preliminary decree did not contain a direction for an enquiry regarding profits, the Court was not competent to entertain that claim at the stage of the final decree. The question was considered at length from various aspects and it was held that it was competent for a Court to entertain the claim at the stage of the final decree even though the preliminary decree did not contain such a direction. A finding was then called for as regards the quantum and on other questions. When the matter came up after the findings were returned by the lower Court, it was dealt with by Oldfield and Venkatasubba Rao, JJ., and this is reported in *Ramaswami Aiyar* v. *Subramania Aiyar*[3]. What is relevant to this purpose is not what is reported in *Ramaswami Aiyar* v. *Subramania Aiyar*[3] but the earlier judgment which is reported in *Ramaswami Aiyar* v. *Subramania Aiyar*[4]. In *Ramaswami Aiyar* v *Subramania Aiyar*[3] the question was whether interest could be claimed in respect of the profits and the learned Judges held that the plaintiff was not entitled to interest. The Subordinate Judge says that a view contrary to *Ghulusam Bivi* v.

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1. (1918) I.L.R. 42 Mad. 296.
2. (1945) 1 M.L.J. 204.
3. (1922) 43 M.L.J. 406: I.L.R. 46 Mad. 47.
4. (1922) 43 M.L.J. 406.

Ahamadsa Rowther[1] could be deduced from the decision in *Ramaswami Aiyar* v. *Subramania Aiyar*[2] only by way of extension of the principle laid down in that case. It is very unfortunate that the subordinate Judge's attention was not drawn to the earlier decision in *Ramaswami Aiyar* v. *Subramania Aiyar*[2].

In *Swaminatha Odayar* v. *Gopalaswami Odayar*[3] this question was dealt with at length by Venkatasubba Rao and Venkataramana Rao, JJ. At page 726, the learned Judges say this :

> "It is then contended that the final decree for mesne profits, not having been preceded by any preliminary decree relating to them, is incompetent. This contention is in our opinion untenable."

Then they discussed the question at great length and referred to the decision in *Ramaswami Aiyar* v. *Subramania Aiyar*[2] and the other decisions. At page 728 they proceeded to say this :

> "It is then contended, the preliminary decree of 1924 being silent on the question of mesne profits, the Court was precluded at a later stage from going into it. That such a contention cannot prevail, has been held in several decisions, with which we agree."

Reference was made to *Ramaswami Aiyar* v. *Subramania Aiyar*[2], *Ramanathan Chetti* v. *Alagappa Chetti*[4]. It was pointed out that as observed by Sadasiva Aiyar, J., in *Ramaswami Aiyar* v. *Subramania Aiyar*[2], in all adjudications which are not intended to be final, there is, and ought always to be, an implied reservation of leave to all parties, to apply for further directions, necessary for a complete disposal of the litigation. Then they referred to the decision of the Judicial Committee in *Maulvi Abdul Majid* v. *Muhammad Abdul Aziz*[5], where it was held that the decision on the question of title was the primary question and the question of accounting was incidental to it and that it was for the obvious advantage of all the parties that the question of title must first be decided and embodied in a preliminary decree and the second in a later stage of the proceedings.

As pointed out by Sadasiva Aiyar, J., in *Ramaswami Aiyar* v. *Subramania Aiyar*[2]

> "Every sharer has a clear right to an account of the profits received by the person in possession of the whole, and to be awarded his share thereof, not as mesne profits received by a person in wrongful possession but as appurtenant to the plaintiff's right in his share of the lands."

When the plaintiff asked for establishment of his right to a share in the lands, what is appurtenant to it, namely, a right to account need not be separately asked and hence there is no substance in the complaint that the plaint did not ask for it. As regards *Ghulusam Bivi* v. *Ahamadsa Rowther*[1] it is unfortunate that the attention of the Subordinate Judge was apparently not drawn to the decisions in *Ramaswami Aiyar* v. *Subramania Aiyar*[2] and *Swaminatha Odayar* v. *Gopalaswami Odayar*[3]. There is also a duty on the part of the judiciary to keep themselves informed of the current decisions of at least this High Court.

The result is that the parties are put to heavy expense and trouble to obtain a proper decision on a point which as stated by Venkatasubba Rao, J., and Venkataramana Rao, J., in *Swaminatha Odayar* v. *Gopalaswami Odayar*[3] is well-settled.

I reverse the decree of the two lower Courts and direct an enquiry by the trial Court into the amount of profits payable to the plaintiff for his half share from the date of suit. The Court-fee paid on the memorandum of second appeal in this Court and on the memorandum of appeal in the lower appellate Court will be refunded. The appellant will have his costs in all the Courts up to date. Further costs will be provided for in the decree of the trial Court.

No leave.

K.S. ——— *Appeal allowed.*

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1. (1918) I.L.R. 42 Mad. 296.
2. (1922) 43 M.L.J. 406 : I.L.R. 46 Mad. 47.
3. (1938) 2 M.L.J. 704.
4. (1929) 59 M.L.J. 102 : I.L.R. 53 Mad. 378.
5. (1896) I.L.R. 19 All. 155 : L.R. 24 I.A. 22 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

S. A. Panchapagesa Ayyar .. *Appellant**

v.

R. Rajamani Ayyar and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 34, rule 14—Sale in contravention of—If void or voidable—Limitation for setting aside—Sons of Hindu judgment-debtor—How far bound by sale in execution.

As regards sales held in contravention of Order 34, rule 14, Civil Procedure Code, it is now settled law that such a sale is not void but only voidable and is good until it is set aside. The violation of the provision in Order 34, rule 14, Civil Procedure Code, confers on the person affected only a right to have the sale set aside either by way of application or by way of suit, if a suit is permissible. But the application or suit must be filed within the time provided by law namely one year from the sale. The sons and grandsons of a Hindu judgment-debtor are bound by a sale held in contravention of Order 34, rule 14, if it is not set aside. The fact that the son or grandson was not *eo nomine* a party to the suit is of no consequence as the interests of the son or grandson are capable of being sold in execution of the decree against the father.

Quaere.—Whether where a separate promissory note is executed for arrears of interest and a sale is held in execution of a decree on the promissory note there is a contravention of Order 34, rule 14, Civil Procedure Code.

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in A. S. No. 82 of 1944, preferred against the decree of the Court of the District Munsiff of Shiyali in O. S. No. 215 of 1943.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Appellant.

K. S. Desikan for Respondent.

The Court delivered the following

JUDGMENT:—In execution of a decree obtained on foot of a promissory note executed by the second defendant in favour of the first defendant, who is the appellant in this second appeal, he purchased the suit properties. The promissory note was for the interest due under the mortgage deed executed by the second defendant in favour of the first defendant in the year 1931. The plaintiffs, who are the two sons of the second defendant, have brought the present suit seven years after the purchase by the first defendant, for the redemption of their 2/3rd share in the mortgaged properties, alleging that the sale in execution of the small cause decree obtained on foot of the promissory note is not binding against their interests in the properties, because the provisions of Order XXXIV, rule 14, Civil Procedure Code were violated. They also claim an account from the first defendant of the mesne profits received by him from the date when he got into possession of the properties under the sale and want that the amount for which he may be found liable in this respect should be set off against the amount due by them under the mortgage.

The District Munsiff held that the sale was in contravention of Order XXXIV, rule 14, Civil Procedure Code, as the promissory note on which the small cause decree was obtained was for interest due under the mortgage and that the plaintiffs were not bound by such sale. He further held that the first defendant was liable to account for the mesne profits since the date of his obtaining possession of the properties under the Court auction sale. He found that under the sale in execution, only the father's 1/3rd share was sold. On appeal by the first defendant, the Subordinate Judge of Mayavaram concurred with the District Munsiff in the findings about the violation of Order XXXIV, rule 14 Civil Procedure Code and the accountability. He however held that what the first defendant purchased was not merely the 1/3rd share of the father but the entire hypotheca.

For the appellant, the point has now been taken for the first time in second appeal that the suit is barred under Article 12 (*a*) of the Limitation Act, as it has been instituted more than one year after the execution sale in Small Cause Suit No. 411 of 1935. This contention naturally raises the question whether the sale is one that requires to be set aside by the present plaintiffs. Whatever the previous

* S. A. No. 476 of 1945. 22nd February, 1946.

view was as regards sales held in contravention of the prohibition enunciated in Order XXXIV, rule 14, Civil Procedure Code, (old section 99, T. P. Act) it is now settled law that such a sale is not void but only voidable and is good until it is set aside. It is really unnecessary to cite authorities in support of this position. If the sale is not a nullity, it requires to be set aside by persons who would otherwise be affected by the sale. It is not alleged that the mortgage created by the father was not binding on the sons; for such a debt due by the father, the interest of the sons also in the joint family property can be brought to sale. In a decree obtained against the father alone, the sons' interest can be proceeded against. As stated already, the finding now is that the entire hypotheca was sold and not merely the father's share of the same. The violation of the provision in Order XXXIV rule 14, Civil Procedure Code confers on the person affected only a right to have the sale set aside either by way of application or by way of suit, if a suit is permissible. But the application or the suit should be filed within the time provided by the law.

The decision of Sundaram Chetty, J., in *Chinnakannu Padayachi* v. *Paramasiva Mudaliar*,[1] and of the Full Bench in *Lal Bahadur Singh* v. *Abharan Singh*.[2] are clear authorities, holding that the sons and grandsons in circumstances similar to those in the present case, where a sale was held in contravention of Order XXXIV, rule 14, Civil Procedure Code (old section 99 of the Transfer of Property Act), are bound by the sale if it is not set aside. Banerji, J., after discussing the question whether the sale is void, and after coming to the conclusion that it is only voidable, enunciates the proposition thus:

> "If that is so, and if such a sale is only voidable it not having been avoided before confirmation the title of the mortgagor or of those whom he represents, or of those who derive title from him passes absolutely to the purchaser and no right remains in those persons by virtue of which they can claim redemption."

There can be no doubt that the second defendant, who is the father, did represent his sons, the plaintiffs, in the prior proceedings. *Narayana Naicken* v. *Venkatasami Naicken*[3] deals directly with the question now before us and holds that such a suit at the instance of the sons brought after one year from the confirmation of sale is barred under Article 12 of the Limitation Act. To the same effect is the decision of the Patna High Court in *Bhola Jha* v. *Lala Kali Prasad*[4]. The fact that the plaintiffs were not *eo nomine* parties to the suit is of no consequence. As stated already, the father was there and he could represent their interest and the decree obtained against him for a debt binding against the sons could be executed against the sons' shares also. When the entire hypotheca thus passed out of the family by reason of the sale, and the sale has stood all these years without being impeached by the sons within the time prescribed by law, there is no longer any subsisting right in them to redeem the mortgage, which has become converted, so to say, into a sale. That a suit for redemption cannot be maintained without first getting the sale set aside was laid down in *Uttam Chandra Daw* v. *Rajkrishna Dalal*[5]. It was held by the Privy Council in *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh*[6], that even in a case where the sons of the mortgagor were minors at the time of the suit on the mortgage and were not properly represented by a guardian, the right of redemption had become extinguished by the decree that was obtained on foot of the mortgage against the mortgagor and his two brothers. The sale extinguished the father's right of redemption and, in so doing, extinguished their own, and unless the sale was set aside, they could not redeem.

The learned Subordinate Judge relied upon the Full Bench decision in *Muthuraman Chetti* v. *Ettappasami*[7] as affording a complete answer to the contention that the sons cannot impugn the sale and he pointed out that the sons were not parties to the decree in that case and it was held that their right to redeem was not affected by such sale. But no question of limitation arose in the case. As a matter of

1. A.I.R. 1927 Mad. 1135.
2. (1915) I.L.R. 37 All. 165 (F.B.).
3. (1926) 51 M.L.J. 845.
4. (1916) 1 Pat. L.J. 180.
5. (1919) I.L.R. 47 Cal. 377 (F.B.).
6. (1920) 39 M.L.J. 108: L.R. 47 I.A. 91: I.L.R. 47 Cal. 924 (P.C.).
7. (1899) 9 M.L.J. 113: I.L.R. 22 Mad. 372 (F.B.).

fact, the suit was filed by a minor plaintiff to set aside the Court sale or to have it declared that it did not affect his rights. Moreover the decision appears to have proceeded upon the footing that the sale was void; on that date the change of view effected by the Privy Council decision in *Malkarjun* v. *Narhari*[1], did not come into force. We find this observation at page 376 in the leading judgment of Shephard, J.:

"Such being the purpose of the Legislature I think it is clear that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained."

If it was void against persons who were not parties, there is no question of setting aside the sale ; if it was only voidable, the plaintiff in that suit was within time when he sought the avoidance. The decisions in *Lakshmadu* v. *Ramudu*[2] and *Hamidgani Ammal* v. *Ammasahib Ammal*[3], relied on for the respondents, do not throw much light on the question now under consideration. If the interest of the sons could be brought to sale in execution of a decree against the father, then the point that the sons were not parties to the decree and therefore the sale is not binding against them, ceases to have any weight.

Mr. Panchapakesa Sastri also contended that, as a promissory note was taken for the interest due under the mortgage and there was an endorsement on the mortgage deed evidencing discharge, *pro tanto*, there was no contravention of Order XXXIV, rule 14, Civil Procedure Code, as the claim on foot of the promissory note, though connected with the mortgage, could not be said to be one arising under the mortgage. He relied upon the unreported judgment in L. P. A. No. 100 of 1938, of Burn and Krishnaswami Ayyangar, JJ., in this connection. In that case, the promissory note was taken in the name of the son, and King, J., held that the decree obtained by the son on foot of the promissory note could not be said to be one arising under the mortgage merely because the son and the father were, or could be stated to have been, members of a joint family at the time. How far the fact that the promissory note stood in the name of the son influenced the learned Judges in the Letters Patent Appeal to reach the conclusion they did, is a matter of some doubt. I do not want to express any final opinion on the question, as I rest my decision on the first point raised for the appellant.

It is also unnecessary to go into the question of the accountability for mesne profits. The plaintiffs cannot have it bothways. If the sale is invalid, which is their contention, then the first defendant, who purchased their 2/3rd interest, cannot be regarded as a mortgagee ; so far as they are concerned, he is only a trespasser.

In the result, the second appeal is allowed with costs and the plaintiffs' suit dismissed, each party bearing their own costs in the Courts below because the point on which the appellant has now succeeded is a point not raised by him earlier.

No leave.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Sri Lakshminarayanaperumalswami by agent Appayyan *alias* Muthukumaran Chettiar .. *Appellant**

v.

Kasthuri Naicker and others .. *Respondents.*

Limitation Act (*IX of* 1908) *Amendment Act* (*I of* 1929), *Articles* 134-A, 134-B *and* 144—*Trustee of a Temple—Alienation by mortgage of certain items—Again sale of certain other items without authority and falsely representing the items to be his private property—Suit to declare them not binding on trust by successor in office—Articles of limitation applicable to the transactions.*

The appellant, a trustee of a temple, was appointed in 1933 displacing the 1st defendant. He sued in 1940, after seven years after coming into the office of trusteeship, for a declaration that a mort-

1. (1900) 10 M.L.J. 368 : L.R. 27 I.A. 216: I.L.R. 25 Bom. 337 (P.C.).
2. I.L.R. 1940 Mad. 123.
3. (1941) 2 M.L.J. 622 (F.B.).

* L.P. A. No. 48 of 1943. 22nd April, 1946.

gage created by the 1st defendant of properties described as items 1 and 2 and the sale of item 3 as well as a sale in execution by Court of item 4 were not binding on the trust and that the appellant was entitled to possession from the alienees. The items 1 and 2 were mortgaged in 1928, on the representation that they belonged to 1st defendant and item 3 again was sold in the same manner. The 4th item had been attached as the private property of the 1st defendant who allowed the sale in 1921, to proceed on that basis. On the question whether the suit against all these alienations was barred by limitation.

Held, (1) that since the alienation by sale of item 3 was made within 12 years of the death, resignation or removal of the transferor the principle of Article 134-B of the Amended Limitation Act applied, and the suit was not time barred.

Venkatasubramania v. *Sivagurunatha*, A.I.R. 1938 Mad. 60 and *Alam Khan Sahib* v. *Karuppannaswami Goundan*, (1938) 1 M.L.J. 113, distinguished.

(2) That so far as the mortgage of items 1 and 2 was concerned Article 134-A applied and saved limitation.

(3) That in the case of item 4 the article governing would be Article 144 of the Limitation Act, since the adverse possession did not start from the date of Court-sale but only from the date when the defendant ceased to hold office as trustee. Therefore the suit as regards that item also was not barred. *Venkateswara* v. *Venkatesa* (1941) 1 M.L.J. 644 : I.L.R. (1941) Mad. 599 (F.B.), applied.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of Somayya, J., dated 19th April, 1945, and passed in S.A. No. 725 of 1944, preferred against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 26 of 1943, preferred against the decree of the Court of the District Munsiff, Udumalpet in O. S. No. 270 of 1940.

P. N. Appuswami Aiyar for Appellant.

K. Subba Rao for Respondent.

The Judgment of the Court was delivered by

The Chief Justice:—The appellant is the trustee of the Sri Lakshminarayana Perumalswami temple at Pallapalayam in the Uudmalpet taluq. He was appointed to the office in 1933, displacing the first defendant. He sued in the Court of the District Munsiff of Udumalpet for a declaration that a mortgage created by the first defendant of properties described in the plaint as items 1 and 2, that a sale by the first defendant of item 3 and a sale by the Court of item 4 were not binding on the trust and that he was entitled to recover possession from the alienees. The first and second items were mortgaged by the first defendant to the fourth defendant on the 12th May, 1928. The first defendant had then been appointed the trustee. The property was mortgaged as belonging to the first defendant and his two brothers, who joined in the mortgage. Two days later the first defendant sold the third item to the fourth defendant, again treating the property as belonging to himself and his brothers. The fourth item was sold in a Court auction on the 10th January, 1921. It had been attached as the private property of the first defendant, who allowed the sale to proceed on that basis. The auction purchaser was one Palani Goundan, who purported to sell the property to the father of the seventh defendant on the 24th September, 1925. During the pendency of the present litigation, the seventh defendant purported to sell it to the eighth defendant.

The District Munsiff held that the suit was well founded, except as regards the fourth item. To this extent he dismissed the action. On appeal by the plaintiff, the Subordinate Judge of Coimbatore held that the sale by the Court on the 10th January, 1921 of the fourth item was also not binding on the trust and consequently the plaintiff was entitled to a decree in full. The alienees then appealed to this Court. The appeal was heard by Somayya, J., who considered that the case was governed by the judgments of this Court in *Alam Khan Sahib* v. *Karruppannaswami Goundan*[1] and *Venkatasubramania* v. *Sivagurunatha*[2]. Consequently he dismissed the suit as being barred by the law of limitation. The present appeal is from this judgment.

The learned Counsel for the appellant contends that the decisions relied upon by Somayya, J., do not apply and the case is governed by Article 134-B of the

1. (1938) 1 M.L.J. 113. 2. A.I.R. 1938 Mad. 60.

Limitation Act. That article was inserted in the statute by the amending Act of 1929. Under it the period of limitation for a suit by the manager of a Hindu, Mahomedan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for valuable consideration is twelve years from the death, resignation or removal of the transferor. Both the decisions in *Alam Khan Sahib* v. *Karuppannaswami Goundan*[1] and *Venkatasubramania* v. *Sivagurunatha*[2] had reference to alienations by trustees of religious endowments which had been made more than twelve years before the insertion of Article 134-B.

We do not need to pause to consider the correctness of the principle there applied, because in the present case the alienations were made within twelve years of the amendment, which therefore applies. The plaint was filed on the 31st July 1940, seven years after the plaintiff had taken over the office of trustee from the first defendant.

It is clear that in so far as the mortgage of the first and second items is concerned, the governing article is Article 134-A which was also inserted in 1929. That fixes a period of twelve years for the setting aside of an alienation made by the manager of a Hindu, Mahomedan or Buddhist religious or charitable endowment, the time commencing from the date when the transfer became known to the plaintiff. It is not suggested that the plaintiff had any knowledge of the mortgage until he filed the present suit. It is equally clear that Article 134-B applies to the sale of the third item. The plaintiff had twelve years from 1933 to institute the suit and he instituted it within seven years.

The position with regard to the fourth items is different. It is admitted by both sides that in view of the decision of the Privy Council in *Vidya Varuthi* v. *Baluswami Aiyar*[3], Article 134-A, does not apply and that the period of limitation is governed by Article 134-B or Art. 144. The learned Counsel for the appellant has to concede that the alienation of item 4 does not fall within the actual wording of Article 134-B, but he says that there is no difference in principle between a direct alienation by a fraudulent manager and a fraudulent manager allowing trust property to be attached and sold as his private property. We find some difficulty in accepting the proposition that this part of the case falls within Article 134-B. In our opinion the more appropriate article is Article 144, but in either case the suit is within time.

The decision of the Full Bench in *Venkateswara* v. *Venkatesa*[4] is here in point. In that case there had been an alienation by the head of a math. The question for decision was whether Article 134-B or Article 144 applied. The Court considered that on the facts of that case Article 134-B applied, but that if it did not, the article applicable was Article 144 and the period of limitation commenced from the death of the Mahanth who had alienated the property. In *Mahanth Ramcharan Das* v. *Naurangi Lal*[5], the Privy Council had held that where a Mahanth has alienated math property, the possession of the alienee does not become adverse during the tenure of office of the Mahanth and limitation only begins to run from the time when the Mahanth ceases to hold office. That principle was applied in *Venkateswara* v. *Venkatesa*,[4] and consequently the Court held that if Article 144 was the governing article, the date of the starting point of adverse possession was the date of the death, resignation or removal of the manager who effected the alienation and not the date of the election of his successor.

In accordance with the Full Bench decision we hold that in respect of the fourth item adverse possession did not start from the date of the Court sale, but only from the date when the first defendant ceased to hold the office of trustee.

The result is that the appeal is allowed and the decree of the Subordinate Judge is restored with costs here and before Somayya, J.

K.C. —— *Appeal allowed.*

1. 1938 1 M.L.J. 113.
2. A.I.R. 1938 Mad. 60.
3. (1921) 41 M.L.J. 346 : L.R. 48 I.A. 302 : I.L.R. 44 Mad. 831 (P.C.).
4. (1941) 1 M.L.J. 644 : I.L.R. (1941) Mad 599 (F.B.).
5. 64 M.L.J. 505 : I.L.R. 12 Pat. 251 : 60 I.A. 124 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Dharba Veera Venkata Satyanarayana and another .. *Appellants**

v.

National Insurance Company, Ltd., Calcutta. .. *Respondent.*

Insurance—Life Policies—Bond executed by assured—Provision for Company purchasing policies in default of repayment of loan amount—Validity—Purchase of policies—Suit by heirs of assured for account—Maintainability.

On 26th October, 1914, the father of the appellants insured his life with the respondent Company under two policies. On the 4th August, 1936, he borrowed from the Respondent on the security of the two policies an amount which was less than the surrender value. The assured continued to pay the premium until March, 1938, when he defaulted. The result was that in September, 1939, the Respondent Company under the terms of the contract of insurance converted each policy into a paid up policy. By August, 1940, the assured owed the respondent in respect of the loan granted to him including interest more than the surrender value of the policies. As the indebtedness exceeded the surrender value the Respondent called on the assured to repay the loan or to reduce the same, and this not having been complied with the policies were cancelled in December, 1940. It appeared that when the loan was granted the assured signed a bond in which he agreed that in case of default of payment on demand made of him the Company should have the power to sell the policies and in the event of the sale being to the company itself the price should be the then surrender value. There was a further provision to the effect that the company should have the right to cancel the policies on payment of the surrender value the cancellation to be deemed to be a sale within the meaning of the bond. It was in exercise of the alternative power that the Respondent cancelled the two policies and allowing for the surrender value there was still due to the respondent a small amount. The assured having died in May, 1942, his sons and widow sued the Respondent company for an account in respect of monies payable under the two policies, and they contended that the provision in the bond for the cancellation of the policies amounted to a clog on the equity of redemption :

Held, that the provision in the bond for the purchase of the policies was bad in law as it violated the rule that a mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the property, and that as the assured had not acquiesced in the cancellation of the policies the plaintiffs were entitled to succeed.

Samuel v. *Jarrah Timber and Wood Paving Corporation*, 1904 A.C. 323 and *Kanaran* v. *Kuttooly* (1897) 8 M.L.J. 62 : I.L.R. 21 Mad. 110, relied on.

Appeal under Clause 15 of the Letters Patent from the judgment of Byers, J., dated 22nd January, 1946, and made in S. A. No. 187 of 1945, preferred to the High Court against the decree of the Court of the Subordinate Judge, Coconada in A. S. No. 171 of 1943, preferred against the decree of the Court of the District Munsiff, Coconada, in O. S. No. 37 of 1943.

P. Somasundaram for Appellants.

T. R. Venkatarama Sastri instructed by *King and Partridge* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice:—On the 26th October, 1914, Venkayya, the father of the appellants, insured his life with the respondent company under two policies, each for Rs. 2,000. On the 4th August, 1936, he borrowed from the respondent Rs. 1,500 on the security of the two policies. The surrender value then amounted to Rs. 1,700. The assured continued to pay the premiums until the 22nd March, 1938, when he defaulted. The result was that the respondent, under the terms of the contracts of insurance, converted each policy into a paid up policy for Rs. 1,782. This was on the 22nd September, 1939. By the month of August, 1940, Venkayya owed the respondent in respect of the loan granted to him, including interest more than the surrender value of the two policies. The indebtedness exceeded the surrender value by Rs. 210. The respondent called upon him to repay the loan or to reduce the amount outstanding to something below the surrender value. Venkayya did not comply with this demand and on the 27th December, 1940, the respondent cancelled the policies under the terms of the contract relating to the loan. When the loan was granted to him the assured signed a bond in which he agreed that in case of default of payment on demand made of him, the company should have the power to sell the policies and in the event of the sale being to the company itself,

* L.P.A. No. 13 of 1946. 25th April, 1946.

the price should be the then surrender value. There was a further provision to the effect that the company should have the right to cancel the policies on payment of the surrender values, the cancellation to be deemed to be a sale within the meaning of the bond. It was in exercise of this alternative power that the respondent cancelled the two policies on the 27th December, 1940. Allowing for the full surrender value, there was still due to the respondent the sum of Rs. 107-6-0.

Venkayya died on the 12th May, 1942. On the 9th February, 1943, his two sons and his widow instituted a suit in the Court of the District Munsiff of Coconada for an account of the amounts payable under the two policies to them as the heirs of Venkayya and for a decree for the total sum found to be due. They maintained that the provision in the bond for the cancellation of the policies amounted to a clog on the equity of redemption. This plea was accepted by the District Munsiff, who passed a decree for the taking of accounts. The respondent appealed to the Subordinate Judge of Coconada, who agreed with the District Munsiff. The respondent then appealed to this Court. The second appeal came before Byers, J., who held that there was no clog on the equity of redemption and dismissed the suit. The learned Judge gave leave to the plaintiffs to appeal under clause 15 of the Letters Patent and this appeal is the result. The appellants are the two sons of Venkayya. His widow died during the pendency of the appeal in the Court of the Subordinate Judge.

We consider that Byers, J., erred in disturbing the decisions of the Courts below. A mortgagee is not allowed at the time of the loan to enter into a contract for the purchase of the mortgaged property. In referring to this rule Lord Macnaughten in *Samuel* v. *Jarrah Timber and Wood Paving Corporation*[1] pointed out that it was founded on sentiment rather than reason, but it was established that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. The provision in the bond signed by Venkayya that in default of payment by him of the loan the respondent should have the right of cancelling the policies and paying the surrender values amounted to a stipulation that the respondent as the mortgagee should have the right of purchasing the policies at their surrender values and as this was made a condition of the loan the rule referred to applies.

In *Samuel* v. *Jarrah Timber and Wood Paving Corporation*[1] the facts were these. A limited liability company borrowed money upon the security of its debenture stock and gave the lender the option to purchase the stock at 40 per cent. within 12 months. Within that period and before the company gave notice of its intention to repay the loan, the lender claimed to purchase the stock at the agreed price. It was held by the House of Lords, affirming the decision of the Court of Appeal, that the option was void and that the company was entitled to redeem the loan on payment of principal, interest and costs. The Lord Chancellor (Lord Halsbury) said :

> "I regret that the state of the authorities leaves me no alternative other than to affirm the judgment of Kekewich, J., and the Court of Appeal. A perfectly fair bargain made between two parties to it each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened, between the two parts of the arrangement, the part of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced ; but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived is contrary to a principle of equity, the sense or reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from."

The principle has been applied by the Courts of India. In *Kanaran* v. *Kuttooly*[2], this Court held that a stipulation in a mortgage deed that if the mortgage money was not paid on the due date, the mortgagor would sell the property to the mortgagee at a price to be fixed by umpires was unenforceable as constituting a fetter on the equity of redemption.

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1. (1904) A.C. 323.
2. (1897) 8 M.L.J. 62 : I.L.R. 21 Mad. 110.

If Venkayya had acquiesced in the cancellation of the policies under the terms of the bond, his heirs would not have been able to maintain this action; but he did not acquiesce. If at the time payment was demanded he had agreed to sell his policies to the respondent for their surrender value, the position would have been the same; but he did not do this. The respondent took over the policies on its own initiative and without any acquiescence on the part of Venkayya, which in law it was not entitled to do. It cannot be said that the respondent took any unfair advantage of Venkayya; it obviously did not, but this does not alter the position.

The appeal must be allowed and the decree of the Subordinate Judge restored with costs before Byers, J., and in this Court. In this Court we fix the advocate's fee at Rs. 150.

B.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR AND MR. JUSTICE KUPPUSWAMI AYYAR.

Mariappan *alias* Vengayan and another .. *Prisoners (Accused).**

Government of India Act (1935), *section* 205—*Granting or withholding certificates—Procedure—Duty of High Court.*

The High Court can grant a certificate under section 205 of the Government of India Act only in cases where a substantial question of law as to the interpretation of the Government of India Act or any Order in Council made thereunder is involved; in other cases a certificate cannot be issued. The section casts on the High Court the duty to consider in every case, of its own motion, whether any such question is involved and to give or to withhold a certificate accordingly. When the High Court says nothing about a certificate and do not grant it, it means that on the materials then before the Court, no such question as would warrant the grant of a certificate is involved. It is not necessary in each case to say in so many words that the High Court withholds a certificate. The High Court is under no obligation to say something in express terms as to what is its intention with regard to the power conferred under section 205 of the Government of India Act.

Trial referred by the Additional Sessions Judge of the Court of Session of the Coimbatore Division for confirmation of the sentences of death passed upon each of the said prisoners in Case No. 17 of the Calendar for 1946 on 1st March, 1946.

V. V. Radhakrishnan and *V. N. Jagannadha Rao* for the 1st and 2nd Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

Chandrasekhara Aiyar, J.—The learned Additional Sessions Judge of Coimbatore, convicted the appellants, who are accused 1 and 2, of the offence of murder of a girl called Kaliammal *alias* Papathi aged 9 years and sentenced them to death. The sentence comes up before us for confirmation. There are criminal appeals filed by the two accused.

The girl Kaliammal *alias* Papathi was the daughter of P.W. 5 and P.W. 7. On the day of the occurrence, namely, 17th December, 1945, she went to her mother's sundry shop in the chuckler's quarters near her village taking food for her and was on her way back to her house finishing her errand. She did not reach home that afternoon as usual. A search was made for her that evening but without any avail. Her dead body minus the jewels that she was wearing was discovered in a cholam field adjoining the path that she took to reach her village. On information received by the police the 1st accused was arrested on 20th December, 1945 and questioned. He then made a statement which led to the discovery of the jewels, M.O. No. 2 series, which the girl was wearing before she met with her fate. This statement was recorded by the Circle Inspector of Police who was in charge of the investigation then and it is marked as P-5. The first accused confessed having stabbled the girl to death and having removed the jewels and concealed

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* R. T. No. 51 of 1946 & Crl. App. Nos. 234 and 235 of 1946. 28th May, 1946.

them in the wall of a vacant house belonging to his aunt. He took the police and the witnesses to the house and produced the tin case in which the jewels were found.

The second accused made a statement before the Taluk Magistrate of Tiruppur on 18th January, 1946, in which he gave his version of the occurrence, the part that he played in it and the fact that the first accused after stabbing the girl to death took away the jewels, put them into a tin case and concealed it on the top of a mud wall. This statement was recorded by the Magistrate after the necessary warning, and though the second accused has alleged that it was got from him as the result of compulsion, there is nothing to show that it was otherwise than voluntary. The only circumstance on which reliance has been placed for the second accused to impugn the value to be attached to this statement is that it was recorded as late as the 18th of January and by a magistrate other than the magistrate to whom originally the requisition was sent according to the Circle Inspector of Police who has been examined as P.W. 18. The original requisition is stated to be missing. It is urged that we should infer from the change of magistrates and the delay that has occurred that pressure was brought to bear upon the second accused in the interval to make a confession corroborating what the first accused has said. There is no warrant, however, for any such inference being drawn, especially when it is remembered that the accused himself did not say before the lower Court that he was produced before the Palladam Sub-magistrate and that he then refused to make any statement confessing his part in the crime and that thereafter he was kept in custody and coerced into submission by the police or by any other authorities.

What the second accused has stated can be taken into account not only as against himself but also as against the first accused. Far from exculpating himself he has given a version which incriminates him completely in the murder of the girl. At the instance of the first accused he gagged the girl's mouth with a cloth and when life became extinct as a result of stabs inflicted by the first accused, he removed the jewels from the legs of the dead body.

As regards the first accused, it was urged that the statement made by him should not have been admitted in its entirety containing the confession that he stabbed the girl, because the jewels that were recovered as the result of the information given by him could not be said to have been so recovered on the strength of the statement that he murdered the girl but only on the basis of his admission that he removed the jewels from the person of the girl. Such truncation or dissection of a statement recorded by the police officer is not warranted according to the law as understood in this Court, whatever may be the view taken in some of the other High Courts about the interpretation to be placed on section 27 of the Indian Evidence Act. Exhibit P-5 was, in our opinion, properly admitted and there is no escape from the conclusion that the girl was murdered by accused 1 and 2 on the afternoon of 17th December, 1945, for the sake of the jewels.

We place no reliance in this case on the evidence given by P.W. 10 even though the learned Sessions Judge appears to have thought something of it. The statement of the boy, that he saw the accused on the day in question with blood-stained hands and with a blood-stained knife, questioned them about the blood and got the unsatisfactory answer that they killed a rat, is worth practically nothing when it is remembered that he did not say anything about all this when the police were investigating into this occurrence the previous day to his knowledge, he being present on the scene. When he was asked why he did not tell them about what he had seen his answer was that he did not remember what he had witnessed.

There is no direct evidence in this case, but the confession of the first accused leading to the discovery of the jewels which the unfortunate girl was wearing on her person just before she was murdered and the statement made by the second accused to the magistrate under section 164, Criminal Procedure Code, make it

perfectly clear that they are guilty of the offences with which they stand charged and were rightly convicted under section 302, Indian Penal Code.

For the second accused, an argument was based on his age which is given as 16 years in Ex. P-1, and as 20 years in the statements made before the lower Courts and it was urged, that the lesser sentence would meet the ends of justice. Age by itself is not an extenuating circumstance and in a case of deliberate and pre-planned murder like this we do not feel justified in treating the case of the second accused differently from the case of the first accused as regards sentence.

The sentences imposed by the lower Court are confirmed and the appeals are dismissed.

The learned Public Prosecutor asks us to say, apparently because he is instructed by the Government to make such a request, that this is not a fit case for a certificate under section 205 of the Government of India Act. Section 205 is in these terms :

"An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act, or any order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly."

The High Court can grant a certificate only in cases where a substantial question of law as to the interpretation of the Government of India Act or any order in Council made thereunder is involved ; in other cases a certificate cannot be issued. The section casts on the High Court the duty to consider in every case, of its own motion, whether any such question is involved and to give or to withhold a certificate accordingly. When we say nothing about a certificate and do not grant it, it means that on the materials now before us, no such question as would warrant the grant of a certificate is involved. It is not necessary, in our opinion, in each case to state in so many words that we withhold a certificate. We are perfectly conscious of the duty imposed upon us by the statute and it is not necessary that we should remind ourselves or be reminded of it on each occasion and say something in express terms as to what is our intention with regard to the power conferred on us under section 205.

K.S. *Sentences confirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

The Public Prosecutor .. *Appellant**

v.

Vadakattu Venkata Narayana and another .. *Respondents.*

Hoarding and Profiteering Prevention Ordinance, (1943), section 6—Offence under—Cost of article to producer to be considered—Additional expenditure incurred by dealer—Whether can be taken into account.

The first and second accused who were respectively the proprietor and salesman employed in a shop were charged for an offence under section 6 of the Hoarding and Profiteering Prevention Ordinance. The case against the accused was that the accused sold a hat for Rs. 7 which had been sold by the producer for Rs. 5-4-0 and so had added more than twenty per cent. to the cost price. It appeared that the accused incurred additional expenditure in respect of the hats as they imported the same by passenger train and not by goods train.

Held, that under section 6 the governing factor was the price at which the producer sold the article and not the cost of the article to the dealer and that the accused were guilty of an offence under section 6 of the Hoarding and Profiteering Prevention Ordinance.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) by the Additional Sessions Judge of the Court of Session of the East Godavari Division in Criminal Appeal No. 126 of 1944 on his file (C. C. No. 10 of 1944, Additional District Magistrate of East Godavari, Coconada).

The Public Prosecutor (*V. L. Ethiraj*) in person.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Respondents.

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* Crl. App. No. 143 of 1945. 10th July, 1945.

The Court delivered the following

JUDGMENT.—This is an appeal by the Provincial Government against the acquittal of the two accused in C. C. No. 10 of 1944 on appeal by the Additional Sessions Judge of East Godavari. The appeal raises the question of the proper construction of section 6, sub-section (2), clause (*b*) (*ii*) of the Hoarding and Profiteering Ordinance. The first and second accused were respectively the proprietor of and the salesman employed in a shop known as the City Emporium in Coconada. The charge against them was that they had sold a hat for Rs. 7 which had been sold by the producer for Rs. 5-4-0 or even less and so had added more than 20 per cent. to the cost price in contravention of the provisions of section 6 of the Hoarding and Profiteering Prevention Ordinance. The Howrah Hat Manufacturing Company of Delhi had agreed to supply the City Emporium with 6 Ajanta Hats, the hat in question in this case is one of these 6, for Rs. 63 per dozen F. O. R. Coconada. It transpired, however, that the hats could not be sent by goods train and, consequently, the Howrah Hat Manufacturing Company proposed that if the City Emporium was willing to have the goods sent by passenger train they would send them in that way, deducting the cost of freight by goods train and leaving the City Emporium to pay the passenger freight. The Emporium accepted this proposal and in consequence they paid the Howrah Hat Manufacturing Company at the rate of Rs. 63 less Rs. 3-4-0 for one dozen hats and themselves paid the M. and S. M. Railway Rs. 11-8-0 for the passenger freight in respect of the hats. The contention of the accused was and is that the first accused was entitled for the purpose of calculating whether the price at which he had sold the article was within the 20 per cent. addition to the price at which the producer sold the article, to add to the price at which the producer sold the article the expenses incurred by him such as freight, forwarding charges and so forth. The learned Additional District Magistrate did not accept this contention. He held, therefore, that the price for which the hats were sold constituted an addition of more than 20 per cent. to the price at which the article had been sold by the producer. He consequently convicted the accused and sentenced the first accused to pay a fine of Rs. 700 and the second accused to pay a fine of Rs. 500. The Additional Sessions Judge took the other view and, holding that the first accused was entitled to charge for the hat 20 per cent. in excess of the cost to him of the hat, which in his view would include the cost of freight and other expenses such as forwarding charges and bank collection charges, found that there had been no contravention of the provisions of section 6 and accordingly acquitted the accused.

For the purposes of this case it is conceded that the relevant provision of section 6 of the Hoarding and Profiteering Prevention Ordinance is section 6, sub-section (2), clause (*b*) (*ii*) by which it is provided that a consideration is unreasonable—if, when the sale is by a dealer, it exceeds the amount represented by the addition allowed by the normal trade practice in force on the 31st day of August, 1939, to

"the price at which the producer sold the article in the case of an article which is not imported"

subject to the proviso that if the addition allowed by normal trade practice exceeds 20 per cent. the dealer must report the fact to the Controller General and take his orders. In effect in this case, as there is no proof of any normal trade practice the question is whether the price at which the hat was sold exceeded the price at which the producer sold the article by more than 20 per cent. The learned Additional Sessions Judge, it seems to me, has not kept his mind on the plain words of section 6 (2) (*b*), sub-clause (*ii*) of the Ordinance but has been inclined to treat the case as if the governing factor was not the price at which the producer sold the article but the cost of the article to the dealer. In the present case there is no dispute that the producer was paid only at the rate of Rs. 59-12-0 for twelve hats and, that being so the sale of the hats at Rs. 7 each added more than 20 per cent. to the price at which the producer sold the articles. The producer was not paid the cost of the carriage of the hats by passenger train and it is quite impossible to say—as the learned Additional Sessions Judge in fact does—that the price at which the producer sold the article may be something more than the price actually

paid to the producer. According to the calculations of the learned Additional Sessions Judge Rs. 76-10-0 must have been the price to the dealer per dozen, but it was not price at which the producer sold the articles for, as already pointed out, all that was paid to the producer for a dozen articles was Rs. 63 less Rs. 3-4-0 which was deducted in respect of the freight that was to have been charged for the carriage of the articles by goods train. It follows, therefore, that on a proper construction of section 6 the price for which the hat was sold Rs. 7 constituted an addition of more than 20 per cent. to the price at which the producer sold the hat. That being so, the conviction of the accused by the Additional District Magistrate was right.

The appeal is allowed and the accused are convicted of the offences with which they were charged. With regard to the appropriate penalty, I think that in the circumstances of the case it will be sufficient if I impose on the first accused a fine of Rs. 250 with two months rigorous imprisonment in default of payment. With regard to the second accused, as he was a mere salesman and the first accused is before the Court and has been punished, a lighter penalty will suffice. He is sentenced to pay a fine of Rs. 10 and, in default of payment, to undergo two weeks rigorous imprisonment.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Official Receiver of Ramnad at Madura, representing the estate of AT. K. PL. SP. Subramanian Chettiar, insolvent in I. P. No. 4 of 1940, Sub-Court, Sivaganga .. *Appellant**

v.

N. P. A. K. Muthiah Chettiar .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rule 16, sections 44-A and 146—Applicability—Decree of Rangoon High Court transferred to Court in British India for execution before separation of Burma—Insolvency of decree-holder after separation of Burma—Continuation of execution by Official Receiver of insolvent's estate—Application to Rangoon High Court to recognise him as transferee—If essential—Procedure.

In 1934, on the decree-holder's application, the Rangoon High Court transferred a decree of that Court to the District Court of Ramnad for execution. The order of transfer was accompanied by a certificate of non-satisfaction. On the 2nd November, 1934, the District Judge of Ramnad transferred the decree to the Court of the Subordinate Judge of Devakottai. After various applications an order for attachment was passed on the 8th April, 1937, and the sale fixed for the 15th October, 1937. An order of adjudication in insolvency of the judgment-debtor on 11th September, 1937, resulted in the order of sale being stayed and the application for execution being declared closed on 3rd December, 1937. The order of adjudication was ultimately set aside on appeal. On the 26th October, 1940, the decree-holder was himself adjudged insolvent by the Subordinate Judge of Sivaganga and the estate devolved on the Official Receiver of Ramnad who applied on 7th December, 1940, to the Subordinate Judge of Devakottai to continue the execution petition which was "closed" on 23rd December, 1937. On 11th February, 1941, the Subordinate Judge passed an order attaching the properties which had already been attached in the 1937 E. P. This application became infructuous as the Official Receiver failed to pay the batta charges and was dismissed by an order dated 10th March, 1941. On 7th February, 1944, the Official Receiver filed another E. P. in which he asked the Court to treat that petition as a continuation of the 1937 E. P. and to attach once again the same properties. The judgment-debtor filed a statement of objections one of which was that the Official Receiver had failed to apply to the Rangoon High Court under Order 21, rule 16, Civil Procedure Code, to recognise him as the transferee of the decree by operation of law. That contention prevailed in the lower Court. On appeal,

Held :—Order 21, rule 16 of the Civil Procedure Code only applies to decrees passed by Courts to which the Code of Civil Procedure applies. The provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India. They can have no application outside British India. After the separation of Burma from India in 1937 the decree of the Rangoon High Court became a decree of a foreign Court and consequently Order 21, rule 16 no longer had application.

Ramabhadra Raja Bahadur v. *Maharajah of Jeypore*, (1919) 37 M.L.J. 11 : L.R. 46 I.A. 151 : I.L.R. 42 Mad. 813 (P.C.) and *Nilkantha Balwant* v. *Vidya Narasinh*, (1930) 59 M.L.J. 379 : L.R. 57 I.A. 194 : I.L.R. 54 Bom. 495 (P.C.), referred to. Sections 44-A and 146 of the Code are applicable to

* A. A. O. No. 71 of 1945. 15th April, 1946.

the case. Section 44-A says that in such a case the decree may be executed in British India as if it had been passed by the District Court itself. The filing of the copy of the decree and the certificate of non-satisfaction in effect complied with the requirements of sub-sections (1) and (2) of section 44-A. In view of the wording of section 146 of the Code it is not incumbent on the Official Receiver to apply to the District Court of Ramnad for permission to proceed in execution of the decree in the Court of the Subordinate Judge. The estate of the decree-holder having devolved on the Official Receiver, he was entitled to apply for the execution of the decree or to continue any such application which may be pending.

Muthiah Chettiar v. *Govindoss Krishnadoss*, (1921) 41 M.L.J. 316 : I.L.R. 44 Mad. 919 (F.B.) and *Venkatachalam Chetti* v. *Ramaswami Servai*, (1931) 62 M.L.J. 1 : I.L.R. 55 Mad. 352 (F.B.), relied on.

Appeal against the order of the Court of the Subordinate Judge, Devakottai, dated 21st October, 1944, in E. P. No. 102 of 1944, in C. S. No. 632 of 1929, High Court, Rangoon.

B. Sitarama Rao and *T. Krishna Rao* for Appellant.

A. V. Viswanatha Sastri and *K. Srinivasan* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal from an order passed by the Subordinate Judge of Devakottai in proceedings instituted for the execution of a decree passed by the Rangoon High Court and transferred for execution to the District Court of Ramnad before the separation of Burma from India on the 1st April, 1937. The appeal calls for the consideration of Order 21, rule 16, section 44-A, and section 146 of the Code of Civil Procedure.

On the 27th July, 1931, the original side of the Rangoon High Court passed a decree in favour of the AT. K. PL. SP. Chettiar firm against two defendants, the K. S. R. M. Chettiar firm and the N. P. A. K. Chettiar firm. The proprietor of the N. P. A. K. Chettiar firm was one Muthiah Chettiar. On appeal the Appellate Side of the Rangoon High Court held that the K. S. R. M. Chettiar firm was not liable, but confirmed the decree in so far as it affected the N. P. A. K. Chettiar firm. The appellate decree was passed on the 11th May, 1933, and was for the sum of Rs. 26,289-6-0 with further interest and costs.

In 1934, on the decree-holder's application, the Rangoon High Court transferred the decree to the District Court of Ramnad for execution. The order of transfer was accompanied by a certificate of non-satisfaction. On the 2nd November, 1934, the District Judge of Ramnad transferred the decree to the Court of the Subordinate Judge of Devakottai. In E. P. No. 2 of 1935 of the Court of the Subordinate Judge of Devakottai the decree-holder applied for execution by the arrest of Muthiah Chettiar, the proprietor of the N. P. A. K. firm. On the 12th March, 1935, an order for his arrest was passed ; but as the decree-holder had failed to pay the batta charges, the application was dismissed on the 20th March, 1935. Eight days later the decree-holder filed another application (E. P. No. 112 of 1935) in which he again asked for the judgment-debtor's arrest. This application was dismissed on the 18th April, 1935, because the judgment-debtor could not be found. On the 23rd February, 1937, the decree-holder filed a third application (E. P. No. 73 of 1937). In this application he applied for the attachment and sale of the properties owned by the judgment-debtor. On the 8th April, 1937, an order for attachment was passed and the sale fixed for the 15th October, 1937.

In 1929, an application had been filed in the Court of the Subordinate Judge of Tinnevelly for the adjudication in insolvency of the proprietor of the N. P. A. K. firm. On the 11th September, 1937, an order for adjudication was passed. This resulted in the order for sale passed in E. P. No. 73 of 1937 being stayed, and the application being declared to be "closed." Muthiah Chettiar appealed to the District Court against the order of adjudication passed against him and his appeal was successful. The District Judge's order was confirmed by this Court.

The AT. K. PL. SP. firm was carried on by one Subramaniam Chettiar, who on the 26th October, 1940, was himself adjudicated an insolvent. As the order of adjudication was passed by the Subordinate Judge of Sivaganga the insolvent's estate devolved upon the Official Receiver of Ramnad. On the 7th

December, 1940, in E. P. No. 46 of 1941, the Official Receiver applied to the Subordinate Judge of Devakottai to continue the E. P. No. 73 of 1937 which was closed on the 23rd December, 1937. On the 11th February, 1941, the Subordinate Judge passed an order attaching the properties which had already been attached in E. P. No. 73 of 1937. This application became infructuous because the Official Receiver failed to pay the batta charges. By an order dated the 10th March, 1941, the application was dismissed.

On the 7th February, 1944, the Official Receiver filed E. P. No. 102 of 1944, in which he asked the Court to treat this petition as being in continuation of E. P. No. 73 of 1937 and to attach once again the same properties. This is the application which has given rise to the appeal. The judgment-debtor filed a statement of objections one of which prevailed. This objection was that the Official Receiver had failed to apply to the Rangoon High Court under Order XXI, rule 16, Civil Procedure Code, to recognise him as the transferee of the decree by operation of law. The Official Receiver has appealed.

The Subordinate Judge erred in holding that Order XXI, rule 16 applied. This is very properly admitted by Mr. Viswanatha Sastri, who appears on behalf of the judgment-debtor. That rule only applies to decrees passed by Courts to which the Code of Civil Procedure applies. The provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India. They can have no application outside British India. (See *Ramabhadra Raja Bahadur* v. *Maharajah of Jeypore*[1] and *Nilkantha Balwant* v. *Vidya Narasinh*[2]. After the separation of Burma from India in 1937, the decree of the Rangoon High Court became a decree of a foreign Court and consequently Order XXI, rule 16 no longer had application.

As Order XXI, rule 16 does not apply, Mr. Sitarama Rao on behalf of the appellant says that the case is governed by section 44-A and section 146. Section 44-A deals with the execution of a decree passed by one of the superior Courts of the United Kingdom or of a reciprocating territory and which has been filed in a District Court in India. The section says that in such a case the decree may be executed in British India as if it had been passed by the District Court itself. Burma is a reciprocating country. It was declared so to be by the Central Government on the 26th March, 1939. The notification is reproduced at page 166 of Volume I of the Civil Rules of Practice and Circular Orders of this Court. A certified copy of the decree of the Rangoon High Court was admittedly filed when the execution proceedings first started in the Ramnad District Court and with it a certificate of non-satisfaction. The filing of the copy of the decree and the certificate of non-satisfaction in effect complied with the requirements of sub-sections (1) and (2) of section 44-A.

Section 146 reads as follows :

"Save as otherwise provided by this Code or by any law for the time being in force where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

For the appellant it is said that inasmuch as Order XXI, rule 16 does not apply here and there is no conflicting provision in any other part of the Code the Official Receiver had the right under section 146 of applying to execute the decree without the permission of any Court. Undoubtedly the estate of the insolvent-plaintiff had devolved upon him and that being so, he was entitled to apply for the execution of the decree or to continue any such application which might be pending. In *Muthiah Chettiar* v. *Govindoss Krishnadoss*[3], a Full Bench of this Court held that Order XXI, rule 16 does not apply to a transfer of a part of a decree, but in such circumstances the transferee of the part has the right of proceeding under section 146 without the necessity of making an application to the Court for permission to do so. In

1. (1919) 37 M.L.J. 11 : L.R. 46 I.A. 151 : I.L.R. 42 Mad. 813 (P.C.).
2. (1930) 59 M.L.J. 379 : L.R. 57 I.A. 194 : I.L.R. 54 Bom. 495 (P.C.).
3. (1921) 41 M.L.J. 316 : I.L.R. 44 Mad. 919 (F.B.).

Venkatachalam Chetti v. *Ramaswami Servai*[1], another Full Bench applied the same principle. It was there held that the legal representative of a deceased decree-holder who had died during the pendency of an execution petition filed by him could be substituted in his place in the execution petition and be allowed to continue it. These cases render direct support for the appellant's argument.

Mr. Viswanatha Sastri has suggested that inasmuch as Order XXI, rule 16 does not apply, but section 44-A does, and that that section says that the decree may be executed in British India as if it had been passed by the District Court, it was incumbent on the Official Receiver to apply to the District Court for permission to proceed in execution of the decree in the Court of the Subordinate Judge. This contention cannot be accepted in view of the wording of section 146 and of the cases to which we have just referred. Undoubtedly the estate of the insolvent plaintiff had devolved upon the Official Receiver and we hold that he was entitled without any formality to proceed with the execution in the Subordinate Court to which the District Judge had transferred the execution proceedings.

For these reasons the appeal must be allowed and the case remanded to the Subordinate Judge to hear and decide the application for execution in the light of this judgment.

The appellant is entitled to his costs.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

V. K. Janaki Amma and another .. *Appellants**

v.

Thazhetheranjoli Kozhipra Raman Nair and others .. *Respondents.*

Madras Marumakkattayam Act, 1932 (*XXII of* 1933), *section* 19—*Applicability "child or children"* —*If include illegitimate children.*

Section 19 of the Madras Marumakkattayam Act must be read as applying only to legitimate children and the words "child or children" in the section do not include the offspring of a union which is not a marriage within the meaning of section 4 of the Act.

(1945) 2 M.L.J. 15, affirmed.

Appeals under clause 15 of the Letters Patent against the decrees of the Hon'ble Mr. Justice Horwill[2] in S. A. Nos. 1353 and 1468 of 1944, dated 30th January, 1945, preferred to the High Court against the decrees of the Court of the Subordinate Judge of Calicut in A. S. Nos. 121 and 123 of 1943 preferred against the decrees of the Court of the District Munsiff of Calicut in O. S. Nos. 885 and 1068 of 1940, respectively.

D. A. Krishna Variar for Appellants.

C. K. Viswanatha Aiyar and *V. P. Gopalan Nambiar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—These two appeals raise the same question, namely, whether the words "child or children" in section 19 of the Madras Marumakkattayam Act, 1932, refer only to a child or children of a marriage recognised by section 4 or whether they include the offspring of a union which is not a marriage within the meaning of the section.

The father of the appellants, Achuthan Nair, died on the 3rd October, 1935. The mother of the appellants died on the 25th August, 1929. The Union between the father and the mother was not registered under the Malabar Marriage Act, 1896. The father left properties which he had acquired in his own right. The appellants filed two suits in the Court of the District Munsiff of Calicut to recover properties of which their father had died possessed. The defendants (the respon-

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1. (1931) 62 M.L.J. 1 : I.L.R. 55 Mad. 352 (F.B.). 2. (1945) 2 M.L.J. 15.

* L.P.A. Nos. 26 and 27 of 1945. 24th April, 1946.

dents in the appeal) were the karnavan and the senior members of the father's tarwad. Under the Marumakkattayam law, unamended by statute, the heirs to Achuthan Nair's self-acquired properties would be the members of his own tarwad; but the appellants say that the provisions of section 19 of the Madras Marumakkattayam Act, 1932, have completely changed the position and that by virtue of it they are their father's heirs, notwithstanding the fact that their parents were not married. The District Munsiff held against the appellants and dismissed the suits. On appeal the Subordinate Judge of Calicut agreed with the District Munsiff. The appellants then appealed to this Court. The second appeals were heard by Horwill, J., who also agreed with the trial Court. The present appeals are from the judgment of Horwill, J., under clause 15 of the Letters Patent.

Before the passing of the Malabar Marriage Act, 1896, a union between a man and a woman subject to the Marumakkattayam law was never regarded as a lawful marriage and the offspring of such a union had no right to inherit their father's property. The hardship of the personal law was eventually realised and the Malabar Marriage Act, 1896, was placed on the statute book. Under it a union between a man and a woman governed by the Marumakkattayam or Aliasanthana law was recognised as a lawful marriage, provided it was registered in accordance with the provisions of the statute, and the children were given rights of succession. The Madras Marumakkattayam Act, 1932, repealed the Act of 1896, completely in so far as it was applicable to Hindus following the Marumakkattayam law of inheritance. Therefore in deciding whether there has been a lawful marriage between a man and a woman governed by the Marumakkattayam law, the Court must now only have regard to the new Act.

Section 4 of the Act of 1932 states what conjugal unions are to be deemed to be legal marriages. A conjugal union of a Marumakkattayi female with a male belonging to the same community or a male belonging to another community shall be deemed for all purposes to be a legal marriage, if the parties to the union are not related to each other in such degree of consanguinity or affinity that conjugal union between them is prohibited by custom or usage, and the union was openly solemnized in accordance with customary ceremonies, if any, before the date on which the Act came into force and was subsisting on that date, or was solemnized in accordance with customary ceremonies on or after the date on which the Act came into force or was registered as a marriage under the Malabar Marriage Act, 1896, and was subsisting on the coming into force of the new Act. The Madras Marumakkattayam Act came into force on the 1st August, 1933.

Section 5 of the Act states that during the continuance of a prior marriage which is valid under section 4, a marriage contracted by either of the parties on or after the 1st August, 1933, shall be void. It also provides that after that date a marriage contracted by a male with a Marumakkattayi female during the continuance of a prior marriage of such male shall be void, notwithstanding that his personal law permits of polygamy.

Section 19 falls in Chapter IV which relates entirely to intestate succession. The section reads as follows:

> "Where the intestate has left surviving him a child or children or a lenial descendant or descendants in the female line through a deceased daughter or daughters or both, and also his mother or a widow or widows or both his mother and a widow or widows, the whole of the property shall belong to them. In the absence of the mother and widow, the whole of the property shall belong to the child or children and such lineal descendant or descendants; and in the absence of the mother, widow and child, the whole of the property shall belong to such lineal descendant or descendants."

The argument of the appellants is that the words "child or children" apply to illegitimate as well as legitimate issue, and emphasis has been laid upon the observations of Lord Westbury in *Mst. Fanny Barlow* v. *Sophia Eveline Orde*[1], where he said that according to natural law the children of a man mean the issue begotten by him, and the *criteria* of this condition are, the being born of a wedded wife or

1. (1870) 13 M.I.A. 277.

wives, or if born of other woman, the being recognised and acknowledged as children by the father. In interpreting the section the Court cannot merely have regard to the Marumakkattayam law as it stood before amendment by statute. It must have regard to the wording of the section and to the scheme of the Act. One object of the Act was to validate unions between persons governed by the Marumakkattayam law, and by reason of it conjugal unions are regarded as valid marriages provided that the formalities required by the measure are complied with. Therefore section 19 must be read as applying only to legitimate children unless there is an indication in the section or elsewhere in the Act that it was intended to apply to illegitimate children as well. The section itself does not contain any such indication. As the section provides for the "widow" participating in the estate of the deceased father should he die intestate, the indication here is all the other way. A widow is a woman who has survived a man to whom she was lawfully married and who was his wife at the time of his death (Stroud's Judicial Dictionary).

We can find no indication to the contrary outside the section. In *Krishnan* v. *Thala*[1], a Bench of this Court in considering a case under section 48 of the Act held that the section would only apply to a marriage valid under the provisions of section 4 (1) (*b*) (*i*) of the Act. Section 30 only gives a right of succession to legitimate children. On behalf of the appellants Mr. Krishna Variar has pointed to section 26 and says that the word "children" here must be read as covering illegitimate as well as legitimate children, but this section merely deals with the property of a Marumakkattayi female who dies intestate. Under her personal law her own property would descend to her children however begotten, and section 26 can only be read as a statutory recognition of a rule of personal law. Section 19 stands on quite a different footing. It makes a provision which is entirely inconsistent with the personal law as it stood before 1896. Therefore it is reasonable to suppose that the Legislature only intended to apply to legitimate issue and as we have already pointed out the section itself gives indication of this in referring to the widow.

For these reasons we agree with the Courts below and dismiss the appeals with costs in Letters Patent Appeal No. 26 of 1945.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR AND MR. JUSTICE KUPPUSWAMI AIYAR.

Nachimuthu Goundan and others .. *Accused.**

Penal Code (XLV of 1860), section 34—Applicability—Essentials—Common intention developing in the course of offence—Conviction of all the accused—Propriety.

The decision of the Privy Council in *Mahbub Shah* v. *Emperor*, (1945) 2 M.L.J. 144 : L.R. 72 I.A. 148 (P.C.) is warrant only for the proposition that it is not enough to attract the provisions of section 34 of the Indian Penal Code that there was the same intention on the part of several people to commit a particular criminal act or a similar intention but it is necessary before the section could come into play that there must be a pre-arranged plan in pursuance of which the criminal act was done. Their Lordships do not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with, nor do they say that the intention cannot be inferred from the conduct of the assailants. The question whether there was such an intention or not will have to depend in many cases on inferences to be drawn from proved facts and not on any direct evidence about a pre-conceived scheme or plan which may not be available at all.

Trial referred by the Court of Session of the Coimbatore division for confirmation of the sentences of death passed upon the said prisoners (accused 3 to 5) in C. C. No. 22 of 1946, on 16th March, 1946, and appeals by the said prisoners.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham*, *K. Narayanaswami*, *V. V. Radhakrishnan* and *M. Srinivasagopalan* for accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

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1. (1941) 1 M.L.J. 508.

*Referred Trial No. 60 of 1946.
Cr.A. Nos. 287 to 289 of 1946.

28th May, 1946.

The Court delivered the following

JUDGMENTS :—*Kuppuswami Ayyar, J.*—The referred trial relates to the sentence of death imposed on accused 3 to 5 in Sessions Case No. 22 of 1946 on the file of the Court of Session of the Coimbatore division. Criminal Appeal No. 287 of 1946 is by accused Nos. 1 to 3 of whom accused 1 and 2 had been sentenced to transportation for life for the murder of the deceased Abdul Kassim Sahib, a constable attached to the Tiruppur police station. The third accused was given the sentence of death for the same murder. The other two appeals are appeals by accused 4 and 5 who have been sentenced to death for the murder of the said Kassim Sahib.

P.W. 5 is the father of accused 1 and 2. The third accused is a nephew of P.W. 5. The fourth accused is a brother of P.W. 5 and the fifth accused is a brother-in-law of the fourth accused. Unfortunately, the relationship between the father (P.W. 5) and the two sons (accused 1 and 2) was not happy. A couple of months prior to the occurrence accused 1 and 2 happened to leave the house taking with them about Rs. 200. They returned home and there was a quarrel between the father and the sons about the return of the money which they had taken away. P.W. 5, the father, and P.W. 6 went to the police station at Trippur and gave a report to the Sub-Inspector Ex. P-16 on 1st December, 1945. Therein P.W. 5 stated that he feared violence and even murder at the hands of accused 1, 2 and 4 and therefore wanted police *bundobust*. The Sub-Inspector deputed the deceased Abdul Kassim Sahib, a constable attached to his station to go and fetch accused 1 and 2. The deceased accompanied by P.Ws. 5 and 6 came in a cart to the village to which P.W. 5 and his sons (accused 1 and 2) belonged and wanted the first and second accused to go with him to the police station at Trippur. P.W. 10 is the bandyman who is said to have driven the cart in which the three people went. The third accused who is a cousin of accused 1 and 2 asked the constable to leave the boys as it was only a minor quarrel but he would not. He wanted bail but there was no one to give bail. Accused 4 and 5 also subsequently came and tried to intercede but in vain. The two young men, accused 1 and 2 accompanied by the constable, went in the cart driven by P.W. 10, towards Trippur. They went as far as Kovilvali. In the meanwhile accused 3, 4 and 5 who were disappointed in their not having been able to retain the two young men in the village got very much annoyed and started towards the bandy in spite of the fact that they were advised not to go and interfere. They were able to overtake the bandy. One of them accused 3 or accused 4 is said to have stated that he would give a sound thrashing to the constable and finish him and take the two boys. The bandyman was attacked and after receiving some injuries got down. Then accused 1 and 2 got down from the bandy. The deceased also got out of the bandy and was belaboured. He fell down; and attempted to escape. Then all the five of them chased him and beat him with sticks and stones, some of the stones being of the size of a man's hand. The deceased died and the assailants went away. This is said to have been witnessed by P.Ws. 14, 15 and 16. P.W. 10, after the deceased fell down, ran to the police station and gave information that the constable was being badly handled by these assailants. It was about 9-45 P.M. when this information was given by P.W. 10. The police thereupon went to the place made an investigation and arrested the third accused who gave the confessional statement (Ex. P-4). Accused 4 and 5 were subsequently arrested and they too gave confessional statements (Exs. P-7 and P-6) on the 8th December, 1945. Accused 1 and 2 were later on arrested and they gave statements (Exs. P-9 and P-10) on 11th December, 1945.

All these accused in their statements admitted that accused 1 and 2 were taken by the constable (the deceased) to the station in the cart driven by P.W. 10, that they all beat the constable and that he died. Besides the confessional statements of these five accused, there is the evidence of P.W. 10, and P.Ws. 14 to 16, who are said to have witnessed the occurrence. The learned Sessions Judge accepting the evidence of the eye witnesses and also the confessional statements—which statements though they were not admitted in the committing Magistrate's Court were admitted in the Sessions Court—found all of them guilty of an offence punishable

under section 302 read with section 34 of the Indian Penal Code for the murder of the deceased Abdul Kassim Sahib and sentenced accused 1 and 2 to transportation for life and the other accused to the extreme penalty of law.

Before us the fact that these accused beat the deceased and caused him injuries and he died in consequence, and the fact that these accused made these confessional statements are not disputed. Apart from the evidence of P.Ws. 14 to 16 and the evidence of the cartman, P.W. 10, there is the evidence furnished by these confessional statements which completely go to prove that the constable did take accused 1 and 2 in the cart driven by P.W. 10 towards the police station, that accused 3 to 5 subsequently came with a view to rescue these two boys and that all of them joined together and caused injuries as a result of which the deceased died. But what is urged before us is that this is not a case to which the provisions of section 34 of the Indian Penal Code can be applied and that it cannot be said that there was any common intention to kill justifying a finding that all these accused are guilty of murder. The medical evidence shows that though there were as many as 27 injuries on the person of the deceased and several of them were serious injuries, there was only one injury which was necessarily fatal, namely, the injury to the head. There is no evidence to show which of these accused it was that caused the particular injury. It is therefore urged since there is no evidence that the fatal injury was caused by which of these accused and if the provisions of section 34 of the Indian Penal Code can be availed of, none of these accused could be said to be guilty of the offence of murder. It is true there is no specific direct evidence to prove that all these five accused set out with a pre-arranged understanding that they should kill the deceased and that it was in pursuance of such common understanding that the deceased was killed. But we have evidence in this case, about the truth of which there is no dispute before us, namely, that after accused 1 and 2 were taken in the cart by the deceased, leaving accused 3 to 5 in the village, the latter three persons subsequently went towards the cart and overtook the cart, that one of these three persons at the time when they reached the cart said that they will have to give a sound thrashing to the constable and even finish him and it is after this was said all the accused belaboured the deceased and even after the deceased fell down all the five of them beat him and left him only after he was dead. From these circumstances it is urged for the prosecution that it is clear that all these persons who belaboured the deceased chased him and caused him as many as 27 injuries, and did so in pursuance of what was stated by one of the accused, namely, that they should belabour the deceased and finish him. The words " finish him " is clearly indicative of the fact that he wanted the deceased to be killed and it was only after he had given this direction that all the accused did the acts which resulted in the death of the deceased. These circumstances are enough to indicate that all the accused acted in pursuance of a common intention to kill and that all these acts were done as the result of a common intent to kill; and when that was so, this is a case to which the provisions of section 34 could be availed of by the prosecution. The case reported in *Mahbub Shah* v. *Emperor*[1] has no application to the facts of this case. There, there was nothing to indicate that there was a common intention. The question as to whether there was a common intention is a question of fact and has to be decided with regard to the facts of each case. In this case the conduct of the assailants and the direction given by one of these accused that they should give a sound thrashing and finish the deceased just before the others took part in the attack, go to show that there was a common intention and it was in furtherance of that common intention that they beat the constable who died as a result of such beating. It is true the doctor deposed that he could not state if the deceased would have died if the fatal injury to the forehead had not been caused. But the fact that none others except these accused were the e and they could have caused that injury is clear from the evidence. Therefore it must have been one of those accused who had caused the injury and if he was one of the persons

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1. (1945) 2 M.L.J. 144 : L.R. 72 I.A. 148 (P.C.).

who shared the common intention to kill and they all did various acts and if the act of one resulted in the death of the deceased then all the accused would be guilty of the offence of murder. We, therefore, agree with the learned Sessions Judge that this is a case in which we will be justified in finding that all the accused are guilty of an offence punishable under section 302 read with section 34 of the Indian Penal Code.

Then the only other question is as regards the sentence. Accused 1 and 2 who were as much responsible as the others who went to the relief of the former two, have been given the sentence of transportation for life by the learned Sessions Judge evidently on account of their youth. With regard to the others it is true, they are elderly persons who ought to have behaved better, but then it must be remembered that there is evidence to show that at the time when they left the village and started on this errand to rescue the two boys they had no other idea except to rescue the boy. This is clear from the evidence of the Asari (P.W. 12). The learned Sessions Judge also points out that it was only subsequently when they went, that the murderous intent must have got into their minds; and when three of them were acting in a frenzied manner and did the various acts, they cannot be said to be pre-meditated acts. The learned Judge also finds that the fatal injury must have been caused by one of the assailants but that it cannot be said which of them caused that injury. In these circumstances we think this is a case in which the lesser sentence should be imposed on accused 3 to 5 as well. We accordingly confirm the conviction and sentence on accused 1 and 2 but while confirming the conviction of accused 3 to 5 reduce the sentence on each of them to one of transportation for life.

Chandrasekhara Aiyar, J.—I agree with the conclusions reached by my learned brother in his judgment just now pronounced but wish to add one or two words on the applicability of section 34 of the Indian Penal Code. The Privy Council decision reported in *Mahbub Shaw* v. *Emperor*[1] was pressed into service by the learned counsel for the appellant to support the argument that as it could not be predicated in this case that there was any common intention on the part of the five accused to kill the police constable and as the learned Sessions Judge has only found that they must be fixed with knowledge that what they were doing was so imminently dangerous that it must in all probability cause death, the appellants cannot be held guilty of murder as there was only one injury, namely, the fracture of the forehead which alone according to the doctor, was necessarily fatal and it might have been caused by a stone hit. The decision of the Judicial Committee is warrant only for the proposition that it is not enough to attract the provisions of section 34 of the Indian Penal Code that there was the same intention on the part of several people to commit a particular criminal act or a similar intention but it is necessary before the section could come into play that there must be a pre-arranged plan in pursuance of which the criminal act was done. Their Lordships do not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with, nor do they say that the intention cannot be inferred from the conduct of the assailants. As my learned brother has pointed out the question whether there was such an intention or not will have to depend in many cases on inferences to be drawn from the proved facts and not on any direct evidence about a pre-conceived scheme or plan which may not be available at all. The question, therefore, is whether on the facts proved in this case we can say that there was such a common intention. If we accept the first information report Ex. P-18, corroborated by the testimony of P.W. 10 who gave the information and who was driving the bandy when it was set upon by accused 3, 4 and 5, and also what is stated by Nachimuthu Goundan (3rd accused) in his confessional statement (Ex. P-4), where he tells us that the fourth accused exclaimed as soon as they reached the cart "Beat the policeman and do away with him," there can be no difficulty in saying that the subsequent acts of brutal beating administered to the constable not only when he got down from the cart but after he was pursued to a distance

1. (1945) 2 M.L.J. 144: L.R. 72 I.A. 148 (P.C.).

of about 100 yards, was due to a common intention on the part of all to "kill him." In taking this view we give full effect to the interpretation given in the judgment of the Privy Council to the words "common intention" in section 34 of the Indian Penal Code, and steer clear of it.

K.S. ——— *Conviction confirmed and sentences varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

Chinnasami Thanjiroyar .. *Petitioner**

v.

Pichai Maricar .. *Respondent.*

Civil Procedure Code (V of 1908), Order XVI, rules 7 and 10—Witness of plaintiff asked by Court to produce a document—Document containing accounts of his own family—Non-production—District Munsiff inflicting summary punishment of fine for non-production—Whether there was jurisdiction for such an order when the Court had not acted under rules of the Code—Evidence Act (I of 1872), section 165 not availed of.

Where the petitioner, a witness of the plaintiff in the District Munsiff's Court, was referred to a note made by him in a private diary, and later he was questioned whether he had maintained accounts of his own family income and expenditure, and he replied in the affirmative, whereupon the Court directed him to produce such accounts the next day, but the petitioner neither appeared again in Court nor produced the accounts and the District Munsiff imposed a fine of Rs. 50 on the witness for contempt of Court in disobeying the order to produce accounts,

Held, that there is no provision in the Civil Procedure Code or elsewhere entitling the District Munsiff to make the order against which complaint was made. The order should be set aside and the fine remitted.

Chunni Lal v. *Emperor*, A.I.R. 1929 All. 99, not followed.

If either party needs the assistance of the Court in procuring evidence, the Court may make orders in accordance with rules. (*See* Order XIII and Order XVI of the Code.) In proper cases the Court may inflict penalties on those who disobey orders made in accordance with the rules.

The Court has of course power to require persons present in Court to give evidence or to produce documents which they have in their possession or power, then and there. (Order XVI rule 7.) But the Court cannot of its own accord issue summons under Order XVI, rule 10.

When the District Munsiff was also not acting under section 165, Evidence Act, under which a Court has wide powers to order production of any document, there was no authority to summarily inflict a fine for non-production of witness's private and family accounts.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court, East Tanjore, at Negapatam, dated 16th December, 1944, in C.M.A. No. 21 of 1944 (I.A. No. 80 of 1944 in O. S. No. 252 of 1942, District Munsiff Court, Tiruturaipundi).

S. Ramachandra Aiyar for Petitioner.

K. V. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This petition arises out of an order made by the District Munsiff of Tiruturaipundi inflicting a fine of Rs. 50 on the petitioner who had appeared as a wtiness for the plaintiff in a suit before him. The petitioner vainly appealed to the District Judge of East Tanjore. He therefore comes to this Court on the ground that the District Munsiff had no jurisdiction to impose a fine and that therefore the District Judge was wrong in confirming such an order.

A preliminary objection was taken on behalf of the respondent that in such a matter only one appeal is allowed and reference was made to section 104 (*h*) of the Code of Civil Procedure. This section, however, refers to an order imposing a fine and made under the provisions of the Code. As I hold that the order was not made under any of the provisions of the Code and that the learned District Munsiff had no jurisdiction, this section does not apply and the objection must be overruled.

The question is whether the District Munsiff has power to punish in respect of contempt of Court in circumstances such as appear in this case. The petitioner,

*C.R.P. No. 705 of 1945. 26th April, 1946.

1. A.I.R. (1929) All. 99.

as stated, was a witness for the plaintiff in a suit. During his examination it emerged that he had accounts of some kind which might throw light upon the issue between the parties. He had not the accounts with him and the District Munsiff ordered him to produce them in Court on another day. The petitioner apparently took no notice of this direction and neither appeared in Court again nor produced the accounts. The District Munsiff, who had apparently taken a very unfavourable view of the petitioner's demeanour in the witness box, had no difficulty on the application made by the defendant—the present respondent, in regarding his disobedience as directly in contempt of the order to produce the accounts. He therefore imposed the fine and in default ordered that the petitioner's property should be attached and sold.

The learned District Judge confirmed the order and held that the Court can punish contempts which take place "under its note in proceedings before it." He cites as authority for this proposition sections 480 and 485 of the Code of Criminal Procedure. It is not necessary to set out these sections at length and it is enough to say that they relate to offences committed in the view or presence of the Court or by a witness or a person called to produce a document before a Criminal Court who refuses to do so and offers no reasonable excuse for his refusal. In such cases the Court may institute proceedings against him in accordance with the Code.

The facts here were different. This was a civil suit and one of the parties had chosen to call the petitioner as his witness. It is difficult to understand how the plaintiff or his counsel was unaware of the existence of these accounts if they had any relevance to the case. It appears to have been a matter entirely for the plaintiff. In a civil suit the Court is not sitting to do some kind of abstract justice but is there to decide the issues between the parties on the evidence, oral and documentary, which they care to produce. Where a witness discloses, accidentally perhaps and may be to the surprise of the counsel who has called him, that he has in his possession books of account which may throw light on the case, it is for that counsel to take steps to see that they are produced as soon as possible lest their non-production, after the fact of their existence has been stated by his own witness, leaves the Court to draw an inference against his client and endangers his case. It is not a matter for interference by the Court, beyond, may be a suggestion that the party concerned, that is to say in this case the plaintiff, might do well to cause the production of the books.

If either party needs the assistance of the Court in procuring documentary evidence the Court may make orders in accordance with the rules. (*See* Order XIII and Order XVI of the Code of Civil Procedure). In proper cases the Court may inflict penalties on those who disobey orders made in accordance with the rules. The Court has of course power to require persons present in Court to give evidence or to produce documents which they may have then and there in their possession or power; Order XVI, rule 7. The Court does not of its own accord issue a summons under Order XVI, rule 10.

Section 165 of the Evidence Act gives a Judge wide powers in the conduct of a case, criminal or civil, and enables him to order the production of any document. The section provides however that a witness cannot be compelled to produce any document which he would be entitled to refuse to produce under sections 121 to 131 if the document were called for by the adverse party. In this case it does not appear that the learned District Munsiff considered that he was acting under the provisions of section 165 of the Evidence Act, for, as appears from his order, the matter first arose over a reference by the witness to a note made by him in a private diary. Later he was questioned whether he maintained accounts of his family income and expenditure and the witness replied in the affirmative, whereupon the Court directed him to produce such accounts the next day. There was no discussion whether the witness could have refused to produce such documents, or about the precise relevance of such accounts to the suit before the Court.

In my opinion, on the facts as they appear from the judgments of the two lower Courts, the matter really became one of inadequate preparation of the plaintiff's

case in that a witness was called without the plaintiff's counsel knowing of the evidence which he would be able to give, or, on the other hand, in that he knew what the evidence was but was prepared to suppress some part of it. In such circumstances, in my opinion, the Judge would have been entitled to draw whatever inference he considered right from the circumstances. I can find nowhere any authority for the proposition that he could summarily inflict a fine upon the petitioner for non-production of his private and family accounts.

Much stress was laid by the respondent-defendant in the suit, who in fact initiated the proceedings against this witness, on the views put forward in *Chunni Lal* v. *Emperor*[1]. The facts there were certainly not unlike those in the present case and the learned Judge says:

> "When the witness or party is present, and the Court directs him by word of mouth to do a certain act, and there cannot be the slightest mistake as to the witness or the party having received information of such direction, it will be merely making a travesty of procedure to insist upon the Court issuing a summons to a witness who is present followed by a proclamation to the witness who is still present, and then attaching his property to make the witness who is present before the Court understand that a document is wanted from him."

One may sympathise indeed with such a view, but the question is whether the rules provide for such a summary procedure as was followed in that case and in this. With the greatest respect I cannot find any provision in the Code or elsewhere entitling the District Munsiff to make the order against which complaint is made. In my opinion the order of the District Munsiff must be set aside, the fine remitted and this petition allowed with costs throughout.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

K. V. Thangavelu .. *Appellant**

v.

The Court of Wards, Madras, and others .. *Respondents.*

Hindu Law—Impartible estate—Sudras—Succession—Widow and illegitimate son of last male holder—Preference—Status of illegitimate son in family—Right to maintenance—Proof of special custom—If essential—If entitled to allowance for marriage expenses—Provision for maintenance by will—Sufficiency or otherwise—Power of Court to review—Will—Power to alienate impartible estate—Limits—Disposition of "என் ஜெமீன் வகையறா சொத்துக்கள் பேரும்"—Interpretation.

The illegitimate son of a Sudra is not a coparcener with his putative father entitled to succeed to him by survivorship. The widow is to be preferred to the illegitimate son in the case of succession to an impartible estate. [*Status of illegitimate son in the family considered and authorities discussed.*]

The illegitimate son of a Sudra has been held to be a member of his putative father's family and to have the status of a son for purposes of maintenance. His right to maintenance from the impartible estate of his Sudra father in the hands of his successors being recognised and given effect to as well established by judicial precedents no proof of any special custom is necessary to entitle him to maintenance from the zamindari. *Kondama Naicker* v. *Kondama Naicker*, (1942) M.W.N. 71, explained. The illegitimate sons however will not be entitled to any allowance for their marriage expenses from the impartible estate.

The Court is not precluded from reviewing the sufficiency or otherwise of any provision made for their maintenance by the will of the putative father. *Case-law discussed.*

The words in a will disposing of "என் ஜெமீன் வகையறா சொத்துக்கள் பேரும்" mean "the zamin and all other properties belonging to me" and are apt enough to cover whatever properties the testator died possessed of. But as in view of section 4 of the Madras Impartible Estates

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1. A.I.R. 1929 All. 99.

*Appeals Nos. 421 and 422 of 1944. 17th April, 1946.

Act, the zamindar has no power to alienate his impartible estate beyond his lifetime except for necessity the will will be inoperative in so far as the zamindari is concerned and operative as to any disposition of the separate properties. *Authorities discussed.*

Appeals against the decrees of the Court of the Subordinate Judge, Trichinopoly, dated 29th April, 1944, in O. S. Nos. 49 and 50 of 1941.

K. Subba Rao, *K. G. Srinivasa Ayyar* and *P. S. Kailasam* for Appellant.

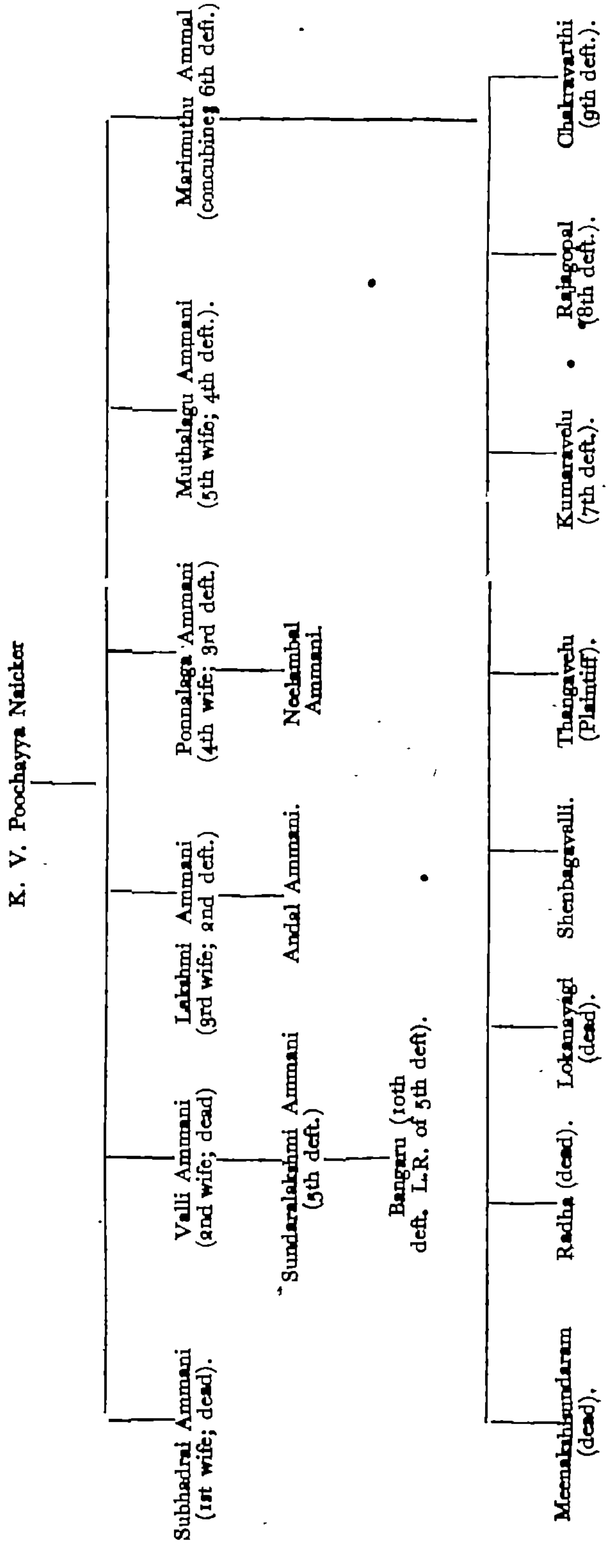
The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—Krishna Vijia Poochayya Naicker who was the last zamindar of Marungapuri, an impartible estate situated in the District of Trichinopoly, died on 17th September, 1926, leaving him surviving three widows and a daughter by a predeceased wife, besides four sons and one daughter who claim to be his illegitimate issue by a permanently kept concubine. On his death disputes arose as to succession to the zamindari which is descendible to a single heir in accordance with the provisions of the Madras Impartible Estates Act, 1904, and the Court of Wards, after making enquiries, recognised the senior widow as the proprietor and assumed control and management of the estate on her behalf on 23rd July, 1927.

In February, 1938, proceedings were commenced in *forma pauperis* in the Court of the Subordinate Judge, Trichinopoly, by the alleged illegitimate sons, the eldest of whom sought possession of the zamindari and partition and delivery of an eighth share in the partible properties left by the zamindar with an account of their income since his death, claiming that, both according to the custom of the community to which the late zamindar belonged and to the Hindu law, he was entitled to succeed to the impartible estate in preference to the widow. He also claimed, in the alternative, arrears of maintenance at the rate of Rs. 100 per mensem from the death of the zamindar up to the date of plaint and future maintenance at Rs. 500 per mensem, together with an allowance of Rs. 10,000, for his marriage expenses, out of the impartible estate. The others claimed partition and delivery of their shares of the partible properties and maintenance out of the estate with allowances for their education and marriage. The proceedings were later registered as O. S. Nos. 49 and 50 of 1941, respectively, after the pauperism of the claimants was established. In both suits the Court of Wards was impleaded as the first defendant and the senior widow as the second defendant and they alone contested the suits, the other members of the family who were also impleaded remaining *ex parte*. The suits were tried together by consent of parties and the whole evidence was recorded in O. S. No. 49 of 1941.

The following genealogical table will show the relationship of parties to one another and how they are arrayed in the main suit O.S. No. 49 of 1941 :—



K. V. Poochayya Naicker
Subhadrai Ammani (1st wife; dead).
Valli Ammani (2nd wife; dead)
Sundaralakshmi Ammani (5th deft.)
Bangaru (10th deft. L.R. of 5th deft).
Lakshmi Ammani (3rd wife; 2nd deft.)
Andal Ammani.
Ponnalaga Ammani (4th wife; 3rd deft.)
Neelambal Ammani
Muthalagu Ammani (5th wife; 4th deft.).
Marimuthu Ammal (concubine; 6th deft.)
Meenakshisundaram (dead).
Radha (dead).
Lokanayagi (dead).
Shenbagavalli.
Thangavelu (Plaintiff).
Kumaravelu (7th deft.).
Rajagopal (8th deft.).
Chakravarthi (9th deft.).

The learned Subordinate Judge found, on the main issues, (1) that the plaintiffs in both suits are the illegitimate sons of the late zamindar by his permanently kept concubine Marimuthu Ammal, (2) that the plaintiff in O. S. No. 49 of 1941 was not entitled by law or by custom to succeed to the impartible estate in preference to the senior widow, (3) that the plaintiffs were not entitled to any share in the separate properties not forming part of the zamindari, as such properties had been validly disposed of by the zamindar by his will dated 30th July, 1915, and 10th August, 1926, and (4) that the plaintiffs were not entitled in law or by custom to maintenance or other allowances out of the impartible estate, as the zamindar had made provision for the maintenance of his concubine and her children and directed by his will that they should have no further claim against his properties. The learned Judge accordingly dismissed the claim in both the suits except for a sum of Rs. 3,000 bequeathed as a legacy to the first plaintiff in O. S. No. 50 of 1941 for which a decree was passed in that suit. Hence these appeals.

The finding of the learned Subordinate Judge that the plaintiffs are the illegitimate sons of the late zamindar by a continuous concubine has not been questioned before us. Nor was any serious attempt made to displace the finding that no special custom was established entitling the illegitimate son to succeed to the impartible estate in preference to the widow. It was, however, urged by Mr. Subba Rao on behalf of the appellants that under the Mitakshara system of Hindu law, as applied to impartible estates, descendible to a single heir, the illegitimate son of a Sudra excluded the widow in a competition with the latter and that, accordingly, the eldest illegitimate son, the plaintiff in the main suit, was entitled to succeed to the late zamindar who was admittedly a Sudra.

Two lines of argument were advanced in support of the claim. In the first place it was said that the illegitimate sons were coparceners with the zamindar and on his death the eldest of them succeeded to the estate by survivorship. Reliance was placed in support of this argument on two decisions of the Judicial Committee of the Privy Council, namely, *Vellayyappa Chettiar* v. *Natarajan*[1] and *Jogendro Bhupathi Hurrochandra Mahapatra* v. *Nityanand Mansingh*[2]. In the first mentioned case their Lordships held that the illegitimate son of a Sudra by a continuous concubine is a member of the father's family and has the status of a son. In the second, it was held that, on the father's death, the illegitimate son and his legitimate half-brother succeeded to the estate as coparceners, so that when the latter died before partition, the illegitimate son took the whole estate by survivorship. It was argued that a coparcenary between illegitimate son and his legitimate half-brother could not spring into being for the first time on the father's death but should be deemed to exist even during the father's life so as to include him also, although the illegitimate son could not demand partition until the father's death. The position of the illegitimate son in the family was said to be more or less analogous to that of an undivided son of the holder of an impartible estate. Just as the latter takes the estate by right of survivorship notwithstanding that his right of enjoyment was excluded, so the illegitimate sons of a Sudra who can take a share only by the father's choice, is nevertheless entitled, on the father's death, to the right of succession by survivorship. This reasoning is, in our opinion, fallacious. For, in the case of ordinary partible property, it is settled law that the illegitimate son takes, in the absence of a legitimate son, an equal share with the widow or the daughter, or the daughter's son, which implies a flat negation of coparcenership with the father. In fact, the special text of Yagnavalkya dealing with rights of the illegitimate son of a Sudra clearly shows that such son does not acquire at his birth any right in his putative father's property, as he can take a share only by his father's choice. This indeed is recognised in *Jogendro Bhupathi Hurrochandra Mahapatra* v. *Nityanand Mansingh*[2]. The analogy of an impartible estate is misleading. As has been pointed out in

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1. (1931) 61 M.L.J. 522 : L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C.).

2. (1890) L.R. 17 I.A. 128 : I.L.R. 18 Cal. 151 (P.C.).

Shiba Prasad Singh v. *Prayag Kumari Debee*[1], impartibility is a creature of custom which has superseded the incidents of joint family property except the right of survivorship. But, apart from such custom, the general law of the Mitakshara does not countenance the idea of coparcenership on the part of a person who has no right to demand partition or to restrain alienations except for necessity and becomes entitled to a share in the property by inheritance. We think that all that was decided in *Jogendro Bhupathi Hurrochandra Mahapatra* v. *Nityanand Mansingh*[2] was that on the father's death the legitimate and the illegitimate sons jointly succeeded to his estate with rights of survivorship as between them. No coparcenership with the father can be deduced from this decision any more than coparcenership with the husband can be deduced from *Bhagwandin Doobey* v. *Myna Baee*[3], where their Lordships held that widows succeeding to his estate were "coparceners in the strictest sense of the term" with mutual rights of survivorship.

An argument was founded on the scheme and structure of Chapters I and II of the Mitakshara as well as on certain observations of Sadasiva Aiyar, J. and Kumaraswami Sastri, J., in *Subramania Iyer* v. *Ratnavelu Chetti*[4] in support of the view that an illegitimate son of a Sudra is a coparcener with his putative father and succeeds to the father's estate as *apratibandha daya* or unobstructed heritage. This argument is so fully and elaborately dealt with in *Ratnasabapathy Udayar* v. *Gopal Udayar*[5] that a detailed examination of it here has been rendered unnecessary. It is sufficient to say that the argument was rejected by the learned Judges. Devadoss, J., observed :

> "The illegitimate son of a Sudra is not a coparcener with his father though he may be a coparcener with his father's legitimate son,"

and Pakenham Walsh, J., said this :

> "The decisions have uniformly held that the coparcenary of the illegitimate Sudra son with his legitimate brothers is caused only by the death of the father and it has never been held that the illegitimate son is a coparcener with his father, still less a coparcener with his father's coparceners."

The same view was also expressed in *Shamu* v. *Babu Aba*[6].

The second line of argument attempted by Mr. Subba Rao was that, even assuming that succession to the late zamindar was not to be determined on the footing of a coparcenary between him and his illegitimate sons, the zamindari being descendible to a single heir, the senior illegitimate son should be held to be a preferable heir to the senior widow. Mr. Subba Rao urged various considerations as grounds for such preference. In the first place, it was said that the illegitimate son took his share in the father's partible property absolutely, while the widow being a female heir, took only a limited estate in respect of her share in the property. We fail to see how this can be a ground of preference. A female heir always takes a limited estate under the Hindu law, but that circumstance is not considered relevant under that system in determining preference. A widow or a daughter ranks higher than many a remoter male heir in the scheme of succession, although the latter, when he takes the property, takes it absolutely. Preferential heirship is determined by other considerations. Reference was made in this connection to *Raja Rup Singh* v. *Rani Baisni*[7], where it was held that the impartible estate there in question belonged to a joint family and that the widow was excluded by a surviving collateral member of the family. There was no competition between the widow and the illegitimate son and the case is not in point. Secondly, it was suggested that as the illegitimate son has been held to be a coparcener with the legitimate son, his status must be considered superior to that of the widow who should accordingly be postponed in a competition with him. We see no force in this suggestion. No general superiority of status can be deduced from the coparcenership with the legitimate son, and we cannot see why such coparcenership should operate as a ground of preference over the widow. It was next urged that

1. (1932) 63 M.L.J. 196 : L.R. 59 I.A. 331 : I.L.R. 59 Cal. 1399, 1413 (P.C.).
2. (1890) L.R. 17 I.A. 128 : I.L.R. 18 Cal. 151 (P.C.).
3. (1867) 11 M.I.A. 487.
4. (1917) 33 M.L.J. 224 : I.L.R. 41 Mad. 44 (F.B.).
5. (1928) 56 M.L.J. 673.
6. (1927) I.L.R. 52 Bom. 300.
7. (1884) L.R. 11 I.A. 149 : I.L.R. 7 All. 1 (P.C.).

the illegitimate son offered *pinda* to the putative father according to *Brihat Parasara* (see *Subramania Iyer* v. *Ratnavelu Chetti*[1]) and this should be regarded as a ground for preference. But as pointed out in *Meenakshi* v. *Muniandi Panikkan*[2], it is well established that, under the Mitakshara system of inheritance, the offering of spiritual benefit is no index to rights of property or preference. Lastly, it was pointed out that the illegitimate son was ranked among the sons in the Mitakshara, while the widow was classed among the heirs who took only in default of male issue. This argument is closely connected with the argument founded on the arrangement of the chapters in the Mitakshara already referred to. While it is true that the conclusions in *Vellayyappa Chettiar* v. *Natarajan*[3], as to the status of a Sudra illegitimate son in the family of his putative father are to some extent based on inferences from the place in which the special texts dealing with the rights of the illegitimate son are to be found in the Mitakshara, it would, in our opinion, be unduly pressing the argument to hold, on the strength of it, that the claim of the illegitimate son to his father's impartible estate must prevail against that of the widow with whom he takes only an equal share where the property is partible. It is pertinent here to point out that the illegitimate son is not included among the 12 categories of sons enumerated by Yagnavalkya in verses 128-132 but is separately mentioned in a special text. In commenting on verses 135 and 136 which prescribes the order of succession to the estate of a "sonless" person (*aputrasya*) the Mitakshara observes:

"A sonless person is he who has no son of any of the aforesaid *twelve* categories." (II—1.3.)

It will thus be seen that illegitimate son is not among the principal and secondary sons to whom the heirs enumerated in Chapter II are postponed, but stands apart with his rights, such as they are, defined by a special text.

On the other hand, it seems to us that a cogent ground for preferring the widow's claim is to be found in her qualified or subordinate co-ownership in the husband's property declared by the Mitakshara. Commenting on verse 52 of Vyavaharadhaya (chapter II) the Mitakshara refers to Apastamba's Dharmasutra :

"From marriage arises also jointness (sahatwam) in the holding of property (dravyaparagraheshu)."

and says that the wife's co-ownership in the husband's property is shown by that text. It goes on to explain why it is necessary to postulate such co-ownership. Manu and other sages enjoin upon every householder the duty of making gifts such as feeding of guests, giving of alms to religious mendicants and the like which, if made by the wife during the absence of her husband abroad, would amount to theft of his property unless the ownership of the property was vested also in the wife ; for, it is not to be supposed that the sages have ordained the commission of theft. The Mitakshara points out that this co-ownership should not be viewed as a negation of partition and refers to the text of Yagnavalkya (II, 115), as recognising the wife's right to an equal share at a partition effected by the husband (*see* Golapchandra Sarkar Sastri's Hindu Law, 8th edition, pages 236 and 237). When dealing with the wife's right of succession to her husband's estate in default of sons, it refers to her right to an equal share at a partition by the husband or by the sons as showing that the view of "Srikara and others" who declare that the wife succeeds only where the estate is small but otherwise gets only maintenance is "mere infatuation" (Vyamohamatram) (Mitakshara 2, 1, 31). It will thus be seen that the wife's right to a share at a partition of her husband's property and her right of succession to such property in default of sons are traceable to her qualified joint interest in such property arising out of her marriage. No doubt, as pointed out in Mayne's Hindu law (10th edition) page 543, the rules of the Mitakshara allotting a share to wives, widows, mothers and grandmothers have become obsolete in southern India owing to the influence of Smritichandrika and the Saraswati Vilasa, but in the northern provinces the Rules are still in force. They are relevant here only as indicating the true basis of the widow's right to inherit her husband's estate. Though her joint interests in the husband's property is not that of a coparcener

1. (1917) 33 M.L.J. 224 : I.L.R. 41 Mad. 44 at 65 (F.B.).
2. (1914) 27 M.L.J. 353 : I.L.R. 38 Mad. 1144 at p. 1148.
3. (1931) 61 M.L.J. 522 : L.R. 58 I.A. 402 : I.L.R. 55 Mad. 1 (P.C.).

but is only of a subordinate character, it may well be regarded, in our opinion, as a ground for preference in a competition with the illegitimate son who has no right to share in the father's property except by his choice.

Such authority as there is on the point also supports the widow's preferential right. In *Parvathi* v. *Thirumalai*[1], this Court had to deal with the claim of an illegitimate son to succeed to an impartible estate left by his father, in preference to the latter's widow and brother who was in possession of the estate claiming to have been undivided from the last holder. There was no dispute between the brother and the widow who conceded the brother's claim to succeed. The trial Court found that the brother was divided, and holding that, in any case, the illegitimate son of a Sudra was, under the Hindu law, a preferable heir both to the widow and to the undivided brother, decreed the suit. On appeal by the defendants this Court came to the conclusion that the brother was undivided and held that the illegitimate son could not exclude his father's coparcener or widow.

Mr. Subba Rao questioned the authority of this decision on three grounds. In the first place, it was suggested that the decision proceeded on the view that under the Hindu law an illegitimate son was excluded altogether by his father's widow even in respect of ordinary partible property—a view which has since been discarded by all the Courts. It was pointed out that the judgment in the unreported case *Kulantha Nachiar* v. *Ramamani*[2] referred to by the learned Judges as supporting the widow's preferential claim contained no indication that an impartible estate was there in question. Reference was made to *Meenakshi Anni* v. *Appukutti*[3], where, in holding that the illegitimate son succeeded as a co-heir with the widow, the daughter or the daughter's son, the Court treated the unreported case referred to above as a decision relating to property that "does not seem to have been impartible property," and criticised the decision on that basis. The learned Judges also observed that:

> "The *ratio decidendi* in the case of *Parvati* v. *Thirumalai*[1] is not, as supposed in the case of *Chinnammal* v. *Varadarajulu*[4] that the widow is preferable to the illegitimate son in the case of an impartible estate *though it may be supported on that ground.*" (Italics are ours.)

This, no doubt, supports Mr. Subba Rao's interpretation of *Parvati* v. *Thirumalai*[1], but we find it difficult to assent to the view that in *Parvathi* v. *Thirumalai*[1] the Court proceeded on any general theory of the widow excluding the illegitimate son in respect of all property. The learned Judges (Sir Arthur Collins, C.J. and Muthuswami Aiyar, J.) expressly state at page 343 referring to *Krishnayya* v. *Muthuswami*[5] and *Ranoji* v. *Kandoji*[6] (to both of which Muthuswami Aiyar, J., was a party),

> "In both these cases it was not doubted that the illegitimate son inherits the separate estate of his putative father on failure of a legitimate son, son's son, son's grandson, widow, daughter, and daughter's son. Nor was it doubted that he is a co-sharer in such separate property with his legitimate brother and *a co-heir with his father's widow, daughter or daughter's son.* There is considerable authority, as observed by the Subordinate Judge, in support of these propositions of law." (Italics are ours.)

The learned Judges thus regarded the illegitimate son's right to succeed as a co-heir with his father's widow as established beyond dispute, and we cannot, in view of that statement, accept Mr. Subba Rao's suggestion, albeit supported by the observations in *Meenakshi Anni* v. *Appukutti*[3] that the *ratio decidendi* in *Parvathi* v. *Thirumalai*[1] was *not* that the widow was preferable to the illegitimate son in the case of an impartible estate. It is to be observed that Sir Arthur Collins, C.J., was a party to both the decisions in *Parvathi* v. *Thirumalai*[1] and in *Chinnammal* v. *Varadarajulu*[4] and the observations at page 314 in the latter case where the earlier

1. (1887) I.L.R. 10 Mad. 334.
2. A.S. No. 86 of 1865.
3. (1909) 20 M.L.J. 359: I.L.R. 33 Mad. 226.
4. (1892) I.L.R. 15 Mad. 307.
5. (1883) I.L.R. 7 Mad. 407.
6. (1885) I.L.R. 8 Mad. 557.

decision was distinguished as relating to an impartible zamindari must, we think, be accepted as a more authoritative interpretation of that decision. On the other hand, it is worthy of note that although the learned Judges in *Meenakshi Anni* v. *Appukutti*[1] understood the decision in *Parvathi* v. *Thirumlai*[2] as proceeding on the erroneous view that widow excluded the illegitimate son under the Hindu law in all cases, they added that the decision might be supported if the rule of exclusion was intended to apply only to impartible estates, that is to say, the learned Judges approved the proposition now contended for on behalf of the second respondent.

Secondly, Mr. Subba Rao urged that *Parvathi* v. *Thirumalai*[2] should no longer be treated as good law as it was based on the theory that the share of inheritance provided for the illegitimate son of a Sudra was in lieu of maintenance—a view which has since been held by the Privy Council in *Vellayyappa Chettiar* v. *Natarajan*[3] to be unwarranted. We do not think that, for this reason alone, the view expressed in *Parvathi* v. *Thirumalai*[2], that, in a competition between the illegitimate son and the widow, the latter is the preferable heir can be considered to have been superseded. The learned Judges elaborately considered the position of the illegitimate son *vis a vis* the other members of the family such as the legitimate son, the adopted son, the father's coparcener and the widow and came to the conclusion that it was in each case relatively inferior, with the result that he must be postponed to the others. Examining his position historically, they observed :

"It was explained in *Krishnayyan* v. *Muttuswami*[4] that an illegitimate son was originally in the position of a slave's son. It was pointed out what the precise position of a continuous concubine was among the fifteen descriptions of slaves enumerated by Narada, and how, under a text of Catyayana, the begetting of a son on a female slave first created an obligation to enfranchise the mother and her son, and eventually passed into a manumission by operation of law owing to the importance attached in early times to a son however begotten. Though relationship as son removed the taint of being born of a slave, the position of the illegitimate son in the joint family, until slavery was abolished by Act V of 1843, was that of a freedman, and in that sense inferior to that of the other members."

And comparing his position with that of the widow in particular, they remarked :

"In *Kalanthai Natchear* v. *Ramamani*[5], it was held by the High Court that even the widow would exclude the illegitimate son. Having regard to the fact that relationship based on a legal marriage is a ground of preference, and that originally the emancipated slave and her son, though free after the birth of the son, would have ordinarily held an inferior position to that of the regular members of the family, we consider that the illegitimate son was properly postponed to the widow."

Apparently, they regarded the unreported case as one dealing with succession to an impartible estate. But whether it was really one of that kind or not, cannot, it seems to us, make much difference to the authority of *Parvathi* v. *Thirumalai*[2]; for the learned Judges have, as pointed out above, given reasons of their own in support of their view that the widow is to be preferred to the illegitimate son in the case of succession to an impartible estate.

Lastly, it was said that, in view of the finding that the brother was undivided from the late zamindar and was the lawful successor to the zamindari, the observations in *Parvathi* v. *Thirumalai*[2], regarding the widow's preferential right as against the illegitimate son were mere *obiter dicta*. This may be so, but, as stated, the learned Judges discussed the relative position of the illegitimate son in his putative father's family in all its aspects and recorded their considered opinion. The view thus arrived at, to which an eminent Hindu Judge, Muthuswami Aiyar, J., has lent the weight of his authority, cannot be disregarded.

The decision in *Parvathi* v. *Thirumalai*[2] was followed in *Viswanathaswami Naicker* v. *Kamu Ammal*[6], which arose out of disputed claims to succession to the Bodinaickanoor zamindari. The competition there was between the illegitimate son (plaintiff), the widow (first defendant) and a cousin of the late zamindar who claimed

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1. (1909) 20 M.L.J. 359 : I.L.R. 33 Mad. 226.
2. (1887) I.L.R. 10 Mad. 334.
3. (1931) 61 M.L.J. 522 : L.R. 58 I.A. 402 : I.L.R. 55 Mad. 1 (P.C.).
4. (1883) I.L.R. 7 Mad. 407.
5. Unreported case A.S. No. 86 of 1865.
6. (1912) 24 M.L.J. 271.

to be a member of the joint family (fifth defendant). It was found that the family was undivided and the plaintiff was excluded by the fifth defendant so far as the impartible estate was concerned. Miller, J., however observed :

> "It is perhaps really not necessary to decide it (the question of division) because if the family were divided then it seems to me on the decision in *Parvathi* v. *Thirumalai*[1], the plaintiff would be excluded by the widow, and if the family were undivided then it seems to me our decision must be that the plaintiff would be excluded by the fifth defendant."

Abdur Rahim, J., expressed himself thus :

> "I am therefore of opinion that the plaintiff is not entitled to succeed to the zamindari as against the fifth defendant. Nor in my opinion can he oust the widow if the zamindari were, in fact, the separate property of the zamindar. He clearly occupies an inferior status, not only in comparison with the legitimate son but also the widow, the daughter and the daughter's son, even if it can be said that he is entitled to an equal share with these persons."

Both the learned Judges were of opinion that the authority of *Parvathi* v. *Thirumalai*,[1] was unimpaired by the decision of the Privy Council in *Jogendro Bhupat Hurrochandra Mahapatra* v. *Nityanand Mansingh.*[2]

These cases have been accepted in leading text books as correctly stating the law (*vide* Mayne's Hindu Law, 10th edition, para. 715 ; Golapchandra Sarkar Sastri's Hindu Law, 8th edition, page 756) and no decision *contra* has been brought to our notice. In dealing with a matter of succession, it is important to bear in mind the note of caution sounded by their Lordships in *Thakoorain Sahiba and others* v. *Mohanlal and others*:[3]

> "To alter the law of succession as established by a uniform course of decisions, or even by the dicta of received Treatises, by some novel interpretations of the vauge and often conflicting texts of the Hindoo Commentators would be most dangerous, inasmuch as it would unsettle existing titles."

We hold accordingly that the claim of the appellant in A.S. No. 421 of 1944 to the impartible estate in suit must fail.

The question next arises whether the appellants are entitled as illegitimate sons to maintenance out of the zamindari. It is settled law that the junior members of the family have no right to maintenance out of an impartible estate except by custom, but the right of sons to maintenance has been so often recognised that it has been held unnecessary to prove the custom in each case. (*Ramarao* v. *Rajah of Pittapur*,[4] *Raja Krishna Yachendra* v. *Raja Rajeswararao*[5]). As already stated, an illegitimate son of a Sudra has been held to have the status of a son and to be a member of his putative father's family (*Vellayyappa Chettiar* v. *Natarajan*[6]). His right to maintenance out of ancestral impartible estates has also been recognised by the Courts. The question arose directly in *Coomara Yettapa Naikar by his guardian Mootooswami Naikar* v. *Venkataswara Yettia*[7]. That case was remitted to this Court by the Privy Council in *Mutthuswami Jagavera Yettappa Naciker* v. *Vencataswara Yettaya*,[8] for determining whether the plaintiff, who was declared by their Lordships to be the illegitimate son of the previous zamindar of Ettiyapuram and, as such, to be entitled to maintenance, was entitled to receive it out of the income of the zamindari. The Court held that " impartible family estate was a fund on which maintenance may properly be charged." The Advocate-General, who appeared for the zamindar did not, it was observed, dispute that the course of decisions had settled the question, and reference was made to *Chuoturya Pun Marden Singh* v. *Shaub Purhulad Syn*,[9] *Naragunty Lutchmeedevammal* v. *Vengan Naidoo*[10] and an unreported judgment of the Privy Council. In 1870, then, the illegitimate son's right to maintenance as against his father's impartible estate in the hands of his successor was regarded as well established and beyond dispute.

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1. (1887) I.L.R. 10 Mad. 334.
2. (1890) L.R. 17 I.A. 128 : I.L.R. 18 Cal. 151 (P.C.).
3. 11 M.I.A. 386, 403.
4. (1918) 35 M.L.J. 392 : L.R. 45 I.A. 148 : I.L.R. 41 Mad. 778 (P.C.).
5. (1942) 1 M.L.J. 132 : L.R. 68 I.A. 181 : I.L.R. 1942 Mad. 419 (P.C.).
6. (1931) 61 M.L.J. 522 : L.R. 58 I.A. 402 : I.L.R. 55 Mad. 1 (P.C.).
7. (1870) 5 M.H.C.R. 405.
8. (1868) 12 M.I.A. 203.
9. (1857) 7 M.I.A. 18.
10. (1861) 9 M.I.A. 66.

It was said on behalf of the second respondent that an examination of the two reported decisions relied on in *Mutthuswami Jagavera Yettappa Naicker* v. *Vencateswara Yettaya*[1] showed that the illegitimate son's right of maintenance was based on the principles of Hindu law applicable to ordinary partible property and not on proof of any custom governing partible estates, and that, in view of the later exposition of the law relating to impartible estates by the Judicial Committee basing the right solely on custom, the earlier decision should not be accepted as authority on the point in issue. We cannot agree. A right which was considered to be indisputably established more than half a century ago and which is not shown to have since been denied or disputed in any decided case cannot, in our opinion, be overthrown on the strength of recently expounded theories regarding its basis. Even the legitimate son's right to maintenance which is now regarded as too well established to require proof of custom in particular cases, appears to have been originally recognised more as a result of readily made concession or assumption of such right based on a general consciousness of its existence on the part of those concerned than as a result of any investigation of instances where such right was claimed and allowed. In *Nilmony Singh Deo* v. *Hingoor Lall Singh Deo*,[2] for instance, where the claim of a grandson of the last holder of an impartible raj was disallowed in the absence of a proved custom to support it, it was observed that,

> "it is undisputed that certain members of the family (the junior sons of the last raja who are by this custom excluded from the actual inheritance are entitled to maintenance from the raja for the time being."

In fact, no case was brought to our notice where the legitimate son's right to maintenance out of an impartible estate was originally upheld on proof of custom in support of such right.

Reference was made to *Kondama Naicker* v. *Kondama Naicker*,[3] as supporting the respondent's contention. The reporter's headnote on that case says :

> "The illegitimate son of a former zamindar of an impartible estate cannot claim maintenance from the zamindari, unless he could prove a special custom in the zamindari."

An examination of the judgment, however, reveals that the headnote is somewhat misleading. The plaintiff in that case was the illegitimate son of a former zamindar Periya Doraiswami who was succeeded by his brother Chinna Doraiswami. The plaintiff, having failed in his claim to succeed to the impartible estate in preference to Chinna Doraiswami, was allowed to seek maintenance out of the zamindari. Not being a son or a brother of the then zamindar Chinna Doraiswami his claim to maintenance out of the zamindari could only succeed on proof of special custom, according to the ruling in *Ramarao* v. *Rajah of Pittapur*.[4] It was however argued (1) that that decision did not apply as there the estate had passed by will to a holder with whom the plaintiff did not claim any relationship and (2) that it had been superseded by later decisions of the Privy Council. These arguments were repelled and the plaintiff's claim was disallowed as no special custom was proved. No distinction appears to have been drawn between legitimate and illegitimate sons in regard to their claims to maintenance out of impartible estates. The plaintiff not having stood in such relationship to the then holder of the zamindari as would have entitled him to maintenance without proof of special custom even if he was a legitimate son, nothing turned on his illegitimacy.

The position may be summed up thus. The sons of a deceased zamindar are entitled to maintenance out of the impartible estate in the hands of his successor without proof of special custom. The illegitimate son of a Sudra has been held to be a member of his putative father's family and to have the status of a son for purposes of maintenance. His right to receive maintenance out of his father's impartible estate was recognised and given effect to as well established

1. (1870) 5 M.H.C.R. 405.
2. (1879) I.L.R. 5 Cal. 256.
3. (1942) M.W.N. 71.
4. (1918) 35 M.L.J. 392 : L.R. 45 I.A. 148 I.L.R. 41 Mad. 778 (P.C.).

by judicial precedents as long ago as 1870. In these circumstances, we consider that no proof of special custom is necessary to entitle the appellants to maintenance out of the zamindari in the hands of the respondents 1 and 2.

Even so, it is urged that, inasmuch as the late zamindar has made provision for the maintenance of the sixth defendant and her children by settlement of other properties and has declared in his will (Ex. D-20) that

> "those properties are quite sufficient for them. Apart from this nothing more from the estate need be given."

the appellants can have no further right of maintenance against the zamindari. It is argued broadly that an impartible property belongs to the holder absolutely except for devolution by survivorship in case he dies as a member of a joint family, it was competent for the late zamindar to provide whatever maintenance he thought sufficient for those entitled to maintenance from the estate, and that the sufficiency or otherwise of the provision is not open to review by the Court. In support of the argument our attention was drawn to the following observation in *Commissioner of Income-tax, Punjab* v. *Krishna Kishore*[1] :

> "Now it is at least certain that the holder of an impartible estate stands in no such relation to those of the junior male members of the family who are entitled to maintenance. Can he not say, 'I have provided sufficiently for my sons; I shall invest the balance of the income for myself.' Certainly he can, so far as the sons are concerned."

We do not think that this passage in any way supports the argument advanced. In arriving at the conclusion that the income of an impartible estate is not the income of the joint family of the holder and his undivided sons but is the income of the holder himself, their Lordships were drawing attention to the essential difference between the position of the *karta* of a joint family owning partible property and that of the holder of an impartible estate. The passage quoted above means no more than that the holder has absolute power of disposal over the income after providing sufficiently for the maintenance of his sons. It cannot be taken to imply that the sufficiency of the provision made for the sons is not open to review by the Court. No such question arose for consideration before their Lordships. We are unable, therefore, to accept the contention, which has found favour with the learned Subordinate Judge, that the provision in the late zamindar's will that no further maintenance from the estate should be paid to the sixth defendant and her children as he had already provided sufficient maintenance for them disentitles the appellants to claim adequate maintenance out of the zamindari. It is pertinent also to point out that in the codicil (Ex. D-2) the zamindar has directed that :

> "If the income out of the lands given away in this way for the maintenance of the aforesaid Marimuthu Ammal (6th defendant) *vagaira* . . . . . falls short or is found insufficient owing to other reasons, adequate allowances to each of them should be paid."

It is the appellant's case that the provision made by the late zamindar for their maintenance is utterly inadequate.

The appellants, however, will not be entitled to any allowance for their marriage expenses, as no case has been brought to our notice where such a claim was allowed against an impartible estate.

It only remains to deal with the appellant's claim to partition and delivery of their shares of the separate properties alleged to have been left by the zamindar. It is not disputed that each of the appellants is entitled to an eighth share of any partible property that may be found to have been left undisposed of by the zamindar. The second respondent, however, contests the claim on two grounds : first, all the properties belonging to the late zamindar had been validly disposed of by him under his will dated 30th July, 1915, read with the codicil dated 10th August, 1926, and there is nothing left undisposed of which the appellants can claim by right of intestate succession. Secondly, the properties referred to in schedules A-2 to A-6, annexed to the plaint in the main suit (O. S. No. 49 of 1941) as being the partible properties left by the zamindar had been incorporated by him with the zamindari and throughout treated as accretions to it. On the other hand, the

1. (1941) 2 M.L.J. 972 : I.L.R. 1942 Lah. 1, 30 (P.C.).

appellants contend that the will and the codicil are invalid, and, even if valid, they do not purport to dispose, and cannot, on their proper construction, be taken to have disposed of, the partible properties. The Subordinate Judge has found (1) that the will and the codicil are valid and all the properties of the zamindar including what are claimed to be his separate properties in the schedules to the plaint have been disposed of thereunder; (2) that the properties described in Schedule A-2 being inam lands within the zamin, paying only *poruppu* to the zamindar are not partible properties, and (3) that the properties mentioned in schedules A-3 to A-6 are the separate properties of the zamindar and not accretions to the zamindari. Findings (2) and (3) have not been questioned before us, but finding (1) has been challenged.

The will Ex. D-20 is a prolix and clumsily drafted instrument, but its main provisions, so far as they are material here, may be briefly summarised. It recites that the zamindar had three wives, Valliammani and defendants 2 and 3, and one daughter Sundaralakshmi D-5, then living. It provides that the senior wife Valliammani should adopt a son of Sundaralakshmi if she had one, but if no son was born to her till her 35th year then any other suitable boy should be adopted. If Valliammani failed to adopt as aforesaid within two years after Sundaralakshmi's 35th year the third defendant should make an adoption in the same manner. If both Valliammani and the third defendant failed to make an adoption, the second defendant should adopt a boy subject to the same conditions. In default of such adoption, Valliammani at first, then the third defendant and thereafter the second defendant should be recognised by the Government as zamindarinis, should receive the "honours, etc., concerning my zamin" and should be paid Rs. 350 more per month than the other two ranis each of whom should get Rs. 150 per month. The daughter Sundaralakshmi should be given Rs. 200 per month for her expenses and on the death of the last surviving widow, she should be recognised as the rani "for my zamin so far as honours, etc., are concerned" and should receive Rs. 500 from the zamin for her lifetime.

"After her lifetime, either her aurasa son or adopted son shall take all my zamin *vagaira properties*. Either the boy who might be adopted for me in accordance with the terms mentioned above, or the aurasa son of Sundaralakshmi or the adopted son alone should take my zamin *vagaira* and none else should take at any time."

The will goes on to provide certain legacies for Sundaralakshmi for her marriage expenses, jewels, etc. Then follows a recital of the provisions made by the testator under a separate deed of settlement for the maintenance of the sixth defendant and her son and daughter (both since deceased) with the declaration already referred to that those properties are sufficient for them and nothing more need be given from the estate.

The codicil, Ex. D-2, made 11 years later, on 10th August, 1926, recites that the daughter Sundaralakshmi became a widow without having any male issue, and that the testator married another wife, fourth defendant. It provides that in the event of his death leaving no male issue, the third defendant, the fourth defendant, and the second defendant, should successively be "ranis" and enjoy the honours in the order specified." Then follow provisions "as regards heir," similar to those contained in Ex. D-20, that a son who might be born within 35 years to his daughter Neelambal Ammani should be adopted by the ranis in the order mentioned, and if no son is born within 35 years a son born to another daughter Andal Ammani should be adopted under the same conditions. If the daughters fail to bring forth a male child, a son that might be born to the daughter of Sundaralakshmi, tenth defendant, before her 40th year should be taken in adoption. Then follow certain legacies for the marriage expenses, jewels and stridhanam of the daughters Neelambal Ammani and Andal. The codicil then recites an additional provision made by the testator for the maintenance of the sixth defendant "who has now become a mother of several children" (*i.e.*, the appellants and their sisters who were all born subsequent to the will D-20) and concludes with the direction already referred to regarding adequate allowances being paid to them if the maintenance already provided is found insufficient.

It is argued for the appellants that there are no disposing words in the will or the codicil either in regard to the impartible estate or in regard to the separate property of the zamindar, and that the documents while directing an adoption to be made to him merely declare that the properties should be enjoyed after his death by those who would take them under the Hindu law as on intestacy. We are unable to assent to this view. No doubt if an adoption was made, the late zamindar's properties would go to the adopted son as on intestacy, but, in default of an adoption which so far has not been made, the provisions of the will disclose dispositions at variance with the scheme of intestate succession. For, under the will, the widows and the daughter are to be paid only certain allowances and "all my zamin *vagaira* properties" are to go to the daughter's son natural born or adopted. It is not therefore correct to say that the will does not purport to dispose of any properties but merely states that they should go to the late zamindar's heirs under the Hindu law. Whether the disposition in so far as it relates to the zamindari is valid and effective is another matter.

The learned Subordinate Judge is of opinion that the will operates as a valid disposition of all the properties of the zamindar including the impartible estate. This, in our opinion, is not correct. In view of section 4 of the Madras Impartible Estates Act, 1904, the zamindar had no power to alienate the estate which is included in the schedule to the Act, so as to enure beyond his lifetime except for necessity. The learned Subordinate Judge based his view on sub-section 5 of section 4 which provides that nothing in that section shall be construed to restrict the power of the proprietor to provide for the succession to the estate "in default of heirs." This provision, however, had no application here as there were heirs to succeed to the estate—the widow or the illegitimate son, according to the final decision in these proceedings (*cf. Konammal* v. *Annadana*[1].) The will must therefore be held inoperative so far as the zamindari is concerned.

This, however, does not affect the validity of any disposition, under the will, of the separate properties of the zamindar if he has made such disposition. It is contended for the appellant that there are no apt words in the will which can reasonably be construed as a disposition of the separate properties of the zamindar as distinguished from the zamin. It is true that the will does not specifically refer to his separate properties, but it purports to dispose of "all my zamindari *vagaira* properties" and these words are, in our opinion, wide enough to cover his separate properties. It was said that the word *vagaira* literally means "and others of the same kind" and, in the context, must be taken to refer only to the zamin, its appurtenances and accretions. We are unable to agree. The terms of the will and the codicil read as a whole clearly disclose an intention on the part of the zamindar not to leave any part of his properties undisposed of by his will. We agree with the learned Subordinate Judge that the tamil words "என் ஜெமீன் வகையறு சொத்துக்களை வெல்லாம்" used by the zamindar mean "the zamin and all other properties belonging to me" and are apt to cover whatever properties he died possessed of.

Lastly, it was suggested that even if the separate properties be held to have been disposed of under the will, such disposition were void as they infringed the rule against perpetuities enacted in section 114 of the Indian Succession Act. Under that rule the vesting of a gift cannot be delayed beyond 21 years from the termination of a life in being at the testator's death. Under Ex. D-20 the dispositions must necessarily take effect within the period allowed by the rule as the adoption must, if at all, take place within the lifetime of the last succeeding widow, and the *aurasa* son or the adopted son of the daughter who is to take in default of adoption to the zamindar must come into existence before her death. Sundaralakshmi having died before 1926 leaving only a daughter (10th defendant) the codicil (Ex. D-2) directs, as already stated, the adoption of any of the other boys indicated therein. According to these provisions, too, the vesting must necessarily fall within the

1. (1927) 54 M.L.J. 504 : L.R. 55 I.A. 114 : I.L.R. 51 Mad. 189 (P.C.).

lifetime of the widow who alone can make an adoption to the zamindar. There is thus no force in the suggestion that the dispositions are void for remoteness.

In the result, the appeals succeed only so far as the appellant's right to maintenance out of the zamindari is concerned. It will be for the lower Court to determine what will be the proper rate of maintenance to be awarded to the appellants having regard to the provision already made by the late zamindar in that behalf. That question not having been considered by the learned Subordinate Judge, we direct that the causes be remitted to the lower Court for the purpose aforesaid. The parties will pay and receive proportionate costs in the appeals which will be provided for in the fresh decree to be passed by the lower Court. The Court below will also make provision in such decree for payment to the Government of the court-fee payable in respect of the appeals.

K.S. — *Appeal allowed in part.*

[PRIVY COUNCIL.]

(On appeal from the Supreme Court of Canada.)

PRESENT :—LORD MACMILLAN, LORD PORTER, LORD SIMONDS, LORD UTHWATT AND LORD DU PARCQ.

Harmes and another .. *Appellants**

v.

Hinkson .. *Respondent.*

*Will—*Onus probandi*—Party who writes or prepares the will a beneficiary—Presumption—"Undue influence"—Burden of proof.*

The *onus probandi* lies in every case upon the party propounding a will: and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased. The onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances which may increase the presumption even so much as to be conclusive against the testator. The adverse presumption may be rebutted.

If no evidence is given by the party on whom the burden is cast, the issue must be found against him. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered. The conscience of the Court must be satisfied by the removal of doubt from the judicial mind.

Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact.

E. Holroyd Pearce, K.C. and *R. M. Balfour* (Canadian Bar) for Appellants.

L. McKenna Robinson, K.C. (Canadian Bar) and *Helier Nethery* for Respondent.

Their Lordships' Judgment was delivered by

LORD DU PARCQ.—On the 4th April, 1941, one George Harmes died at the Grey Nuns' Hospital in the city of Regina. Two days later Mr. Hinkson, the respondent to this appeal to His Majesty in Council, brought to the manager of the Canada Permanent Trust Company at its office in Regina a document which purported to be the will of George Harmes. It was dated the 3rd April, 1941, and named the Trust Company as executor.

On the 2nd May, 1941, a petition was presented by the Trust Company, as executor, to the Surrogate Court of the Judicial District of Regina praying that the will might be proved in solemn form. Its validity had been challenged by the next of kin, one of whom, Paul Harmes, is the first named appellant. The others,

* P. C. Appeal No. 67 of 1943. 13th May, 1946.

who lived in Greece, were represented in the ensuing proceedings by the second appellant, the Custodian of Enemy Property.

In due course an order was made directing a trial to determine the validity of the will, and in particular the following issues : (*a*) the testamentary capacity of the deceased at the time of its execution, (*b*) its due execution, (*c*) the knowledge and volition of the testator as to its contents, (*d*) the allegation that the execution of the will was procured by the undue influence of Hinkson.

The learned judge of the Surrogate Court, after a lengthy trial, affirmed the will, and decreed probate in solemn form. On appeal, the Court of Appeal for Saskatchewan (by a majority, the Chief Justice dissenting) reversed the decision of the Surrogate Court. There was a further appeal to the Supreme Court of Canda. This appeal was heard by five judges, Rinfret, Kerwin, Hudson, Taschereau and Gillanders, JJ. By a majority, Hudson, J., alone dissenting, the appeal was allowed and the decree of the Surrogate Court was restored. Paul Harmes and the Custodian of Enemy Property sought and obtained special leave to appeal to His Majesty in Council, and their Lordships, with the valuable assistance of counsel, who put their opposing contentions before the Board with much force and commendable moderation, have given anxious consideration to a case which has caused so striking a difference of judicial opinion.

The facts need only be stated in the barest outline to show that the circumstances in which the will was made called for strict investigation. George Harmes was a dying man when he signed the impugned document. He was suffering from a disease which, though it may not impair the intelligence, induces mental torpor and, in the end, coma. The total value of his estate was about $ 65,000, Under the will the respondent Hinkson, by a devise and bequest of the residue, was to benefit to the extent of somewhat more than $ 50,000. And it was Mr. Hinkson, a gentleman who by profession is a barrister and solicitor, who drew the will, with no witness present until, after the body of the document was complete, two nurses were called in to witness its due execution. "From the outset," said the learned judge of the Surrogate Court, "the document is charged with suspicion," and no one has questioned this opinion.

In order that the matter in dispute may be properly understood, more of the facts must be stated, and something must be said of the two men who alone were concerned in the making of the will, George Harmes and Ernest Hinkson.

George Harmes was born in Greece of poor parents. When he was no more than fourteen years of age he left his native country for the United States of America, and there he lived until, about thirty years before his death, he left the United States for Canada, and settled in Regina. He seems to have had little education, but considerable aptitude for business. He had done well in trade, was the proprietor of a number of shops in which fruit and confectionary were sold, and had finally acquired a hotel which seems to have been favourably regarded, not least because of a popular beer parlour which was part of the establishment. Harmes is said to have been a genial and friendly man and many witnesses were called who counted themselves among his friends. He was a bachelor. His nephew, the appellant Paul Harmes, lived in Toronto, and he had two sisters, some nephews and a niece living in Greece. His nephew Paul had at one time assisted him in the management of his hotel, but he had lost touch with his kinsfolk in Greece and took little interest in them. He seems to have been a man of strong opinions, with, as was said, "a mind of his own." He died at the age of 57.

Mr. Hinkson is a man of education, a university graduate who left the teaching profession for the practice of the law. He had lived in Regina since the year 1910, and for about twenty years had practised there as a barrister and solicitor. He is a married man, with two sons and a daughter. It is right to say that no suggestion whatever was made against either his professional or his general reputation, and that apart from any criticism that may be made of his conduct in this case, he must be regarded as a man of high character.

The learned judge was satisfied that the two men had been good friends. There was ample evidence, which he accepted, to show that their friendship was of more than ten years' standing, although for some reason, possibly because Harmes had been in failing health, they had seen rather less of each other than usual during the two years which preceded Harmes's last illness. The friendship had been close and intimate. They had common interests, were both enthusiastic members of a fraternity called "the Knights of Pythias," met at many social gatherings, and had often been companions on sporting expeditions. What was more, Harmes had been made free of the Hinksons' home, and had frequently been their guest, both at Regina and at their country cottage at Katepwe. One of the witnesses, Mr. Doerr, a King's counsel, who had known Hinkson for many years, described his relations with Harmes as being "quite friendly and chummy," and recalled how two or three years before he had seen Harmes making himself "quite at home at the Hinkson cottage." The learned judge attached great importance to this domestic intimacy. Much evidence had been given in an attempt to show that there was no very close friendship between Harmes and Hinkson. With only two possible and, as the judge thought, unimportant exceptions, there was not (he said) "a particle of evidence to indicate" that Harmes had been entertained in any other home in the city of Regina as he had been in that of the Hinksons. "I would say," he added, "with regard to those two exceptions . . . that I would not rate them as comparable in social prestige with the entertainment at the Hinkson home."

Early in 1941, Harmes was in bad health. He was sometimes obstinate and it was difficult to persuade him to see a doctor. When he was at last induced to take medical advice, it was found necessary to take him to the hospital, which he entered on the 1st March, little more than a month before his death. He was then gravely ill. An obstruction of the bladder, too long neglected, had caused injury to the kidneys, which resulted in uraemic poisoning. On the 15th March Dr. Kraminsky, who was attending him, called in Dr. Good, a specialist, and on the 1st April, the doctors performed a minor operation on their patient. The obstruction was successfully removed, but incurable damage was already done and the operation could not save him. By the 3rd April, the doctors knew that he could not be expected to live long. Before the events of that crucial day are narrated, it is desirable to mention one incident to which the appellants attached significance.

On a day early in March, Mrs. Hinkson accompanied her husband on a visit to the hospital. On that occasion, as Mr. and Mrs. Hinkson both admitted, Harmes had been asked to lend Mrs. Hinkson $2,500. It was suggested that this was a callous attempt to get money from a sick man, that the couple had displayed such an eager acquisitiveness that they had arrived with a cheque which only needed the deceased's signature to complete it, and that Harmes had not only refused the request but shown annoyance and resentment at it. Mr. and Mrs. Hinkson both gave evidence about this incident, and the judge believed them. There is no doubt that his belief was fully warranted, since Mrs. Hinskon, who was called to rebut the suggestions of the present appellants, was not cross-examined. Her evidence was that in March neither she nor her husband knew or suspected the gravity of Harmes's illness, that she needed a balance of $2,500 in order to buy a house, that her children persuaded her to ask George Harmes to lend her the money, and that, although her husband was very much opposed to her doing so, he decided to accompany her. The story that a cheque had been prepared was, she said, absolutely false. Harmes had promised to think the matter over, and had said that if he made the loan he would charge no interest. There was some evidence that Harmes had expressed himself strongly to others about this request for a loan, and the learned judge thought it "possible" that he might have done so, but "questionable" whether he had. On this, as on other points, the judge was unfavourably impressed by the evidence of those who belittled the friendship which existed between Hinkson and Harmes.

In the light of the judge's findings on this matter, which they see no reason to question, their Lordships are not prepared to regard the incident of the suggested loan as of any importance.

Mr. Hinkson's evidence as to the critical day was long and detailed. Their Lordships cannot do better than repeat the careful statement of it which is contained in the dissenting judgment of Martin, C.J.S., in the Court of Appeal. The learned Chief Justice said :—

"During a period of about a month while the deceased was confined in the hospital Hinkson visited him frequently, and about noon on April 3, 1941, he called to see him and found that the deceased did not appear to be improving as fast as was expected after a recent operation. According to Hinkson's testimony, after leaving the hospital on this occasion he called to see the physician, Dr. Kraminsky, who was attending the deceased, to inquire from the physician as to what was wrong with the deceased. The physician informed him that Harmes was suffering from uremic poisoning; that he should have had medical attention years ago, that the poison had spread throughout his system, and that he might live for weeks or months or only for days. During the course of the conversation the physician informed Hinkson that one Hendricks, the manager of the Bank of Montreal, had telephoned him on that day inquiring as to the condition of the deceased and as to whether or not he was in a condition to have his will made. Dr. Kraminsky advised Hinkson that he had told Hendricks that the deceased was in condition to have his will made and that he should have it attended to at once. Hinkson then remarked to Dr. Kraminsky that he was a personal friend of the deceased and asked the physician what he would think of his (Hinkson's) going there. To this the physician replied that it would be 'all right' if he (Hinkson) desired to see that a will was made, and he advised Hinkson to have it attended to immediately. Hinkson thereupon proceeded to the Wilson Stationery Company where he purchased a will form and went to the Grey Nuns' Hospital. He arrived at the hospital at 5-20 p.m., went immediately to the room of the deceased and asked him if Hendricks had been to see him and the deceased replied that he had. Hinkson then asked the deceased if Hendricks had said anything to him about making a will and the deceased replied that he had not. Hinkson then stated that this seemed strange as he had been informed by Dr. Kraminsky that Hendriks was to visit the hospital to see the patient about his will. Hinkson then informed the deceased that he had brought a will form with him 'if you would like to do anything about it,' that the doctor had told him that he was a sick man, and that it might be well for him to make a will. The deceased at first demurred but finally instructed Hinkson to prepare the will; according to Hinkson the deceased was quite normal mentally at the time; discussion then took place as to the appointment of an executor; Hinkson suggested that Hendricks be made executor but the deceased was not impressed; he then suggested a trust company and deceased said, 'I think that would be better,' and asked Hinkson to suggest a trust company; Hinkson suggested the Canada Permanent Trust Company, and the deceased agreed. Hinkson then asked the deceased what bequests he desired to make and the deceased named the Greek Relief Fund. On being told that there might be more than one Greek Relief Fund the deceased said that the last contribution he made was through the Royal Bank of Canada, and he then suggested a legacy of $ 1,000 to the Greek Relief Fund payable through the Royal Bank of Canada. The deceased then began to enumerate other bequests and Hinkson took a receipt form from his pocket so as to be able to take a memorandum on it of them. This form is produced in evidence and contains a written memorandum of all the bequests contained in the will except the one to Mrs. Kolueri, the niece in Greece, which was the last bequest agreed upon and which is noted on the memorandum by the word 'Kolueri' only. The next bequest named by the deceased was $ 1,000 to the Old Folks' Home at Wolseley. Then followed a bequest of $ 5,000 to his sister Helen Sernou of Kolena in Greece and the deceased, at Hinkson's request, spelled for him the words 'Sernou' and 'Kolena'. At this point the deceased asked for the total of these bequests and referred to the amount of money he had in the bank and to the amount necessary to pay succession duty on his estate. He stated that he had in the bank from $ 20,000 to $ 25,000 and expressed the opinion that the succession duty would be $ 10,000. Hinkson testified that as they continued he totalled the bequests from time to time so as to keep within the limit of the money in the bank as the deceased wanted to make bequests not exceeding $ 13,000 or $ 14,000. Hinkson asked the deceased about other relatives and referred to his nephew Paul Harmes now of Toronto but formerly of Regina; at first the deceased would not agree to leave anything to the nephew but finally on Hinkson's advice instructed him to include a legacy of $ 2,000 for Paul Harmes. The next bequest named by the deceased was to an orphanage in the city of Medicine Hat and, after some discussion in which Hinkson suggested that it might be better to give something to an orphanage in the province of Saskatchewan, the deceased instructed a legacy of $ 1,000 to the Orange Orphanage at Indian Head and also a legacy of $ 1,000 to the Children's Orphanage in the city of Medicine Hat. The deceased then mentioned $ 2,000 to the best student in Greek at the University and after discussion he decided that the amount should be left to the University of Saskatchewan as a scholarship fund, the interest to be payable to the best student in Greek, and the scholarship to be known as 'The George Harmes Scholarship in Greek.' The deceased then stated that he wanted to leave $ 1,000 to Mrs. Kolueri, the niece residing in the village of Kolena, Greece, and Hinkson took a note of this legacy on the memorandum as before referred to. Hinkson then asked the deceased about other relatives, but he said 'No,' and referred to a sister in Greece but stated, 'She is married and has got a husband looking after her,' and 'I am not going to leave her anything or any of the rest of them.' He then asked, 'How much does that total up to? and on being told said, 'That's enough.' Hinkson then said, 'What about the balance of the estate?' and enumerated the Arlington

Hotel, the Diana Cafe and a property on 5th Avenue, and said, 'What about them?' To this question the deceased replied, 'I am going to leave them intact.' Hinkson suggested to the deceased that he leave the residue to the Dominion Government to help along the war effort: he also asked him about his nephew Paul Harmes, stating: 'There is the Arlington Hotel down there . . . . he used to operate the hotel for you . . . . he is in that line of business. Why not leave him the hotel then?' To this the deceased replied, 'I have left him all I am going to leave him . . . . I wouldn't have left him that much if it had not been for you . . . . He doesn't know anything about the value of money, or property.' Hinkson then suggested 'Pete' (Peter) Borgares who had visited the deceased at the hospital frequently but the deceased stated, 'I won't leave anything to Pete.' Hinkson then said, 'I have made these suggestions and if you don't want to act on them, have you made up your mind as to what you want to do with the balance of the estate?' The deceased appeared to consider the matter for a short time and then said, 'Well, you have been the best friend that I have got, you can have it.' To this Hinkson replied, 'It would not be right for me to accept it.' He also suggested to the deceased, 'You could still double or treble these bequests—you could give a big share of it to the Dominion Government—some more to charities, and if you wanted to leave me a little bit of it that would be in order, but to leave me the whole thing it would not be proper, it wouldn't be right.' Hinkson also suggested to him at this time that rather than complete the will that night they leave it till the following day but deceased said, 'No, we will to-night.' According to Hinkson this conversation occurred about 6-30 o'clock in the evening, and he then completed writing the legacies, of which he had a record on the receipt form, into the will and when all was complete except the residuary bequest he said to the deceased, 'George, have you made up your mind about the balance?' and deceased replied, 'Yes I have made up my mind.' Whereupon Hinkson stated, 'If you feel that way about it I will put my name in here on the will form and if you want to change your mind about it overnight I will come back with another will form to-morrow,' and again, 'We will make out an entirely new will if you change your mind overnight.' Hinkson then filled in his own name in the residuary clause and at this point, about seven o'clock, two nurses, Miss Sizer and Miss Montgomery, arrived to witness the will.

It appears that about 5-30 in the evening when deceased had signified his desire to make a will, a nurse entered the room—or some one at least whom Hinkson took to be a nurse—and Hinkson said to her, 'Would you mind getting another nurse and be somewhere handy where I can call you?' Mr. Harmes here is making a will and we will need a couple of witnesses.' At 6-30 p.m. two nurses entered the room and asked if the will was ready; on being informed in the negative one of them instructed Hinkson to pull the light cord when he required them and then left the room returning about 7 o'clock when they again asked Hinkson if he was ready. Hinkson replied that he was 'just about ready.' At that time the will had been completed except the attestation clause which Hinkson then completed and then said to the deceased in the presence of the nurses, 'George, you had better wait till to-morrow before you sign this will,' but the deceased said, 'No, give me the will now, I will sign it now.' The will was then signed by the deceased in the presence of the two nurses who signed the same as witnesses in the presence of the testator and in the presence of each other. It was not read over to the deceased in the presence of the nurses but Hinkson testified that as he wrote each legacy into the will from the memorandum he had kept he read it over to the deceased and received his approval. After the will was signed and after the nurses left the room Hinkson gave the will to the deceased who placed it under his head but on Hinkson's suggestion it was placed under the pillow. Hinkson testified that throughout the whole time which the provisions of the will were under discussion and at the time it was executed the deceased was mentally alert."

One addition may usefully be made to this narrative. Mr. Hinkson had never acted professionally for his friend George Harmes, but he said that in the course of conversation he had learned from him that there were "certain bequests" which it was his intention to make. He thus explained his anxiety to learn from the doctor whether Harmes could make a will, and to persuade him to make one.

Mr. Hinkson visited the hospital again during the afternoon of the following day, the 4th April. He had meanwhile spoken on the telephone to an official of the Succession Duty Department and ascertained that the amount of succession duty under the will as drawn would be $ 28,611.00. According to his own evidence, which on this point was not challenged, he took a new will form with him to the hospital. He saw Harmes and found him less happy about his own condition. Hinkson told him the result of his inquiry about succession duty, and he said, "Well, that is all right. We won't do anything about it now." Hinkson offered to send for "a preacher or a priest", but the offer was refused. After a few minutes, seeing that Harmes "was getting dozy" and did not want to talk, he said, "God bless you, good-bye" and so left him. Later in the evening he returned, but though he went into the sick room, he had no conversation with the testator. He obtained possession of the will, which had been placed in a drawer. He learned later that his friend was dead: in fact he died between 11 p.m. and midnight.

It is now necessary to refer to the evidence relating to the mental condition of the testator on the 3rd April. It is convenient to deal first with that of

Mr. Hendricks, who, after his conversation with Dr. Kraminsky, had visited the sick man shortly after 2 p.m. He had spoken to him about making a will, and tried to get his signature to a power of attorney, but had given up the attempt. Dr. Kraminsky's advice had been, to use Mr. Hendricks's own words, "that I might find him so that I could discuss things with him temporarily and I might not—the thing to do was to go and see." At an early stage in his evidence Mr. Hendricks said that he tried to arouse Mr. Harmes, and added, "I think I succeeded in arousing him so that he knew who I was, although I am not even certain of that." Harmes "tried to discuss his affairs" with him, but "could not sustain the effort." "I thought," said Mr. Hendricks, "I was working a hardship upon Mr. Harmes and I let the matter drop and went home." He had put a power of attorney before the sick man, and "that part of the business . . . went just so far as for him to try to sign it, but he couldn't." Later, under cross-examination, the witness said that he believed that at that moment Harmes understood the contents of the document. One question and answer, on which the respondent's counsel much relied, may be quoted :—

Q. Then at two o'clock of that day he had sufficient mental power and alertness to understand the nature of a power of attorney?

A. He did, I guess; I thought he did . . . . or I wouldn't have asked him to sign it.

Dr. Kraminsky and the consultant, Dr. Good, both gave evidence. The former was in substantial agreement with Mr. Hinkson as to the conversation which he had had with him. He had said, when asked if Harmes could make a will: "If you don't do it to-day you never will be able to do it probably." Dr. Kraminsky's evidence seems to their Lordships to have been given with great fairness. He was wise enough not to be too dogmatic, and completely candid about his recollection. He described the usual symptoms of sufferers from uræmia, how they will appear to be bright, then get drowsy and fall asleep in the middle of an answer. But he did not profess to remember whether Harmes was "brighter or less bright than the ordinary patient". He thought he was "just the average case." He did remember that on the morning of the 3rd April, he had his eyes closed practically all the time. He thought that he might have been able to make a will, but it would have been necessary for him to be present in order to give a decided opinion. When he was asked whether the suggestion that he should make a will, and the fact that "some new thing was confronting him" would stimulate his mind, he gave the frank reply that medical science could not answer that question. Uræmic poisoning affected the activity of the brain, but no medical man could say how far the degree of that activity depended on the poison in the patient's blood, and how far on "the way he feels".

Dr. Good took a rather more unfavourable view of the testator's condition. He had visited him regularly and "doubted his ability to concentrate satisfactorily for more than a very brief period". He agreed, in answer to the judge, that he had not "challenged him to a sustained attention". He "did not believe that he had the mental capacity to realise the entire significance of his actions". His visits, however, had lasted no more than five minutes, and he could not recall any occasion on which Harmes had failed to answer satisfactorily any question that he put to him. On the 3rd April, he had seen him once only, at 8 in the evening.

The evidence of the nurses who attested the will was that on the 3rd April he was intelligent and rational. One of them, Miss Sizer, said that he "was in rather a weak condition but he seemed all right. He knew everything, what he was doing and everything". The other, Miss Montgomery, said that he was "wide awake". A "Nurses' Record", which was put in at the trial and bears Miss Sizer's signature, has the words "Listless, does not respond readily and irritable" in reference to the afternoon of the 3rd April, but it may be said that, generally speaking the evidence of these two witnesses strengthened the case for the will.

It is necessary to refer to only one other witness, Miss Evans, who was engaged as a "special nurse" for Mr. Harmes, and first took up her duties between 8-30 and 9 p.m. on the 3rd April. She then saw him for the first time and said that he then "appeared to be in full possession of his faculties". On her arrival he had

raised the question of payment of her fees. He found out from her what her charges were and asked how she would like to be paid, by the day or by the week. He said that he did not want to be bothered, that his bill at the hospital was being paid for two weeks, that he was " a well-off man " and that she need not worry about being paid. He was " wide awake," she said, and " quite alert."

It was Miss Evans who received Mr. Hinkson when he came to the hospital in the afternoon, and again in the evening, of the 4th April. In the afternoon he asked her about her patient's condition, and she " gave him the doctor's opinion, that he might live for a week or so, or he might die immediately." Hinkson, she said, told her " not to allow any visitors in, as they would most likely just be people who weren't his friends." On his later visit he asked for the will, " saying that it would save him the trouble of coming down if Mr. Harmes should die during the night." She found it and gave it to him. Afterwards, thinking that she might have done wrong, she asked Harmes if he knew the gentleman who had just left the room. He replied that it was Mr. Hinkson, a lawyer. He then, to quote the witness, " said either ' he was ' or ' he is drawing up my will, but he doesn't know half my affairs'." She did not tell him that she had given the will to Hinkson, because " he was very drowsy that day, didn't want to be bothered with anything." But even on the 4th April, when she learned during the earlier visit that Hinkson wished to speak to him about his will, she thought " that he should have his will attended to without delay."

The evidence of the most important witnesses has now been set out in sufficient detail to show the nature and substance of the case which the learned judge of the Surrogate Court was called upon to determine. He found that the testamentary capacity of the deceased, the due execution of the will, and the knowledge and volition of the testator as to its contents, had all been established. He held that there was no evidence to support the allegation of undue influence. The Supreme Court having restored and affirmed the learned judge's decision, the immediate question for their Lordships' consideration has been whether the appellants had succeeded in showing the judgment of the Supreme Court to be erroneous. In the opinion of the majority of the Supreme Court, the learned judge had made no error in law, and had come to a decision on the facts, in face of contradictory evidence, which there was no sufficient reason to disturb. In a short judgment in which Kerwin and Taschereau, JJ., concurred, Rinfret, J., expressed his complete agreement with the judgment of the Chief Justice of Saskatchewan, and Gillanders, J., gave judgment to the like effect.

Counsel for the appellants sought to show that, at least in respect of those issues in which the burden of proof lay on those propounding the will (all the issues, that is to say, except that raised by the allegation of undue influence), the judgment of the Surrogate Court was vitiated by an error in law. This contention had the strong support of the three judges who, in the Courts of Canada, were for pronouncing against the validity of the will. The argument was that the learned judge had failed to give effect to two rules of law which, had he observed them, must have led him to a contrary conclusion. These rules were said by Parke, B., not to admit of any dispute when he re-affirmed them in *Barry* v. *Butlin*[1]. They were then formulated as follows :—

" the first that the *onus probandi* lies in every case upon the party propounding a will ; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

The second of these rules was, as Parke, B., remarked, " laid down by Sir John Nicholl, in substance, in *Paske* v. *Ollat*[2] and is stated by that very learned

1. (1838) 2 Moo. P. C. 480. 2. (1815) 2 Phill. 323 : 161 E.R. 1158.

and experienced judge to have been handed down to him by his predecessors," Sir John Nicholl's statement of the rule differs only in expression from that of Parke, B. He spoke of "the presumption" as well as the *onus probandi* being against the instrument, and, in a passage much relied on by the appellants' counsel, said :—

"The onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances which may increase the presumption even so much as to be conclusive against the instrument."

The course taken by the argument makes it desirable that their Lordships should make some comments upon these well-established rules. With regard to the first, it is always well to remember, when the familiar metaphor of "the burden of proof" is employed, precisely what it means. "The strict meaning of the term *onus probandi*," said Parke, B., in the case already cited, "is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him." A valuable supplement to this observation is to be found in the words used by Lord Dunedin when he delivered the judgment of their Lordships' Board in *Robins* v. *National Trust Co.*[1] :—"*Onus* as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered." The concluding words of the rule as it was stated by Parke, B., emphasise the necessity of the complete removal of doubt from the judicial mind. "The conscience of the Court" must be satisfied. Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact.

The second rule has commended itself to many generations of judges and has thus rightly acquired the status of a rule of law, but it is no more than an application to particular circumstances of a principle which may be supposed to guide all persons of prudence and good sense in their ordinary affairs. The principle is that when the only man who can prove a fact has a strong motive for asserting it, his evidence must be received with greater caution than that of a disinterested witness and that every circumstance of legitimate suspicion which is found to exist must make any reasonable man less ready to accept his uncorroborated testimony. The rule applies this general principle to the particular case of a will. It warns the Judge that, in circumstances such as exist in the present case, the evidence of the witness who drew the will must be received with caution, but this does not mean that it must be rejected altogether. The burden of proof may be discharged. The adverse presumption may be rebutted. Sir John Nicholl's words are not to be understood as meaning that at some point, which the law can define, the Judge will be in a position to say that the presumption has become conclusive against the will, so that, if he were trying the case with a jury, it would be right to direct them that they must pronounce against it. If this were the meaning of the rule, it would involve the untenable proposition that it is a question of law whether or not a presumption of fact has been rebutted. That question must always be one of fact, and the true meaning of Sir John Nicholl's words is that unless the tribunal is finally satisfied that its initial suspicions were unfounded the burden of proof remains undischarged and the presumption must prevail.

It was said, however, that the learned Judge had erred in law because he had not given enough weight to the various circumstances of suspicion which admittedly were present. It had to be conceded that from the outset he had professed to regard the will as "a document charged with suspicion," but in effect it was contended that if he had really been suspicious, he had not been suspicious enough. Complaint was made that he too readily believed Mr. Hinkson, found excuses for his conduct and sometimes benevolently intervened during his cross-examination.

1. (1927) A.C. 515, 520.

Their Lordships have given full consiedration to these criticisms but, with all respect to those learned Judges who have expressed them, they are satisfied that there is no sufficient ground for them, and no ground at all for saying that the learned Judge either overlooked or disregarded the relevant rules of law. Those rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth. Their Lordships agree with the majority of the Supreme Court that no error in law has been established.

The question remains whether the learned Judge's decision on the facts was erroneous, and so manifestly erroneous that an appellate Court ought to set it aside. Their Lordships will not repeat what has been said in so many authoritative decisions, notably in *Powell* v. *Streatham Manor Nursing Home*[1], as to the respect which an appellate Court ought to pay to the opinion which a Judge who has watched and listened to the witnesses has formed as to their credibility. There are no doubt cases in which a Judge can be shown to have misapprehended part of the evidence, or to have drawn inferences from the facts found which cannot reasonably be justified, or in some other way to have left his decision fairly open to attack. In the present case the learned Judge took a most favourable view of Mr. Hinkson's evidence, and believed it, and their Lordships are of opinion that the Court of Appeal had no sufficient reason for disagreeing with him. The appellants' strongest argument was founded on the medical evidence which, considered by itself, would certainly make it at least doubtful whether the deceased had testamentary capacity and a disposing mind. But it was for the Judge to consider the evidence as a whole. All the witnesses whom their Lordships have mentioned (with the exception of Miss Evans, who was examined on commission), gave evidence before him, and the judgment makes it plain that he gave full consideration to the evidence of the doctors. The Judge thought that they were speaking, to some extent, from their general knowledge of the disease rather than from a clear recollection of the condition of one of many patients, and he preferred to rely on the evidence of the nurses. This is a matter on which the Judge who has tried the case is best qualified to express an opinion. Their Lordships would add that the doctors' evidence, if the fullest possible weight be given to it, though it casts doubt upon the evidence of Hinkson, cannot be said to render it incredible, and, further, that the evidence of Miss Evans shows that the mind of the deceased was sufficiently alert for the discussion of a matter of business.

The learned Judge formed the opinion that Mr. Hinkson was "guileless—somewhat of a simple innocent type of mind." "I don't think he is an astute planner of an outrageous haul or anything of that kind," he said. It was rightly said by counsel for the appellants that the truth might lie between these two extremes, and it was suggested that a fairer view of Hinkson was that he was so intent on the business which he had officiously undertaken, and was of so insensitive a nature, that he had failed to appreciate the enormity of seeking to extort a testamentary disposition from a weak and only intermittently conscious man, and perhaps had even persuaded himself that the deceased had full capacity and a disposing mind. Their Lordships are bound to say, however, that it is impossible for them, judging only from the printed page, to decide between the various opinions of the witness's character which its perusal may leave open for acceptance by different minds. While, therefore, they would not endorse every one of the opinions expressed by the learned Judge, and in particular are disposed to think that he somewhat exaggerated the difficulties of Mr. Hinkson's position, they have come to the conclusion, in agreement with the Supreme Court, that his decision on the facts must stand.

The allegation of undue influence must be separately considered. The burden of proving it is on those who attack the will, either as a whole or in part. As has been said, the learned Judge held that there was no evidence to support the alle-

1. (1935) A.C. 243.

gation. Their Lordships heard from Mr. Balfour, of counsel for the appellants, an ingenious argument founded on a passage in Sir James Hannen's summing up to the jury in the case of *Wingrove* v. *Wingrove*[1], when the learned President said: "From advanced age or from some other cause a person may be so weakened that, upon a thing being pressed upon him, he becomes so fatigued in brain as to consent to do it, though it is an act with which his brain does not go." It was submitted that these words might well be applied to the present case, and that the evidence of Mr. Hinkson himself justified the inference that the enfeebled will of the sick man had been overborne by his friend's relentless importunity, until at last, anxious only for peace and quiet, he was coerced into the expression of wishes "with which his brain did not go." Their Lordships need only say, with regard to this contention, that their acceptance of the Judge's findings of fact compels them to reject it. If Mr. Hinkson's evidence was true, he exercised no undue influence. It is legitimate to urge upon a man whose condition is precarious the desirability of making a will. Such pressure as was exercised in respect of particular dispositions fell far short of coercion, and was used, not for the benefit of Mr. Hinkson, but against his own interest and in support of the claims of others.

The learned Judge of the Surrogate Court was satisfied that Mr. Hinkson was not influenced by any dishonourable or improper motive, and, having found on the evidence that he was the testator's best friend, rightly attached great importance to the fact that there was nothing unnatural in the dispositions of the will. Their Lordships, while in no way questioning this conclusion, are far from commending Mr. Hinkson's conduct as an example to be followed. The learned Judge spoke sympathetically of the difficult position in which he was placed, but their Lordships feel that the difficulties were of Mr. Hinkson's own making. Elementary prudence would have suggested that either the sick man should be advised to procure the services of a lawyer, acting professionally, or, at least, that some third person, a medical man if possible, should be present to hear the testator's approval of the contents of the will. The omission to take such reasonable precautions as these might well have resulted in a dispute even if the will had contained no disposition in Mr. Hinkson's favour, and a member of the legal profession might have been expected to foresee this possibility of costly litigation in which part of his friend's estate would inevitably be consumed. In the event, in accordance with the order of the Supreme Court, from which their Lordships in no way dissent, the costs of all parties in the Surrogate Court, in the Court of Appeal and in the Supreme Court are to be paid out of the estate. These costs are, no doubt, considerable, and Mr. Hinkson must by now be persuaded that his conduct, however well-intentioned, was ill-advised.

Their Lordships will humbly advise His Majesty that the appeal to His Majesty in Council should be dismissed. The appellants must pay the respondent's costs of this appeal.

Solicitors for Appellants: *Charles Russell and Co.*

Solicitors for Respondent: *Blake and Redden.*

H.J.U./K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE YAHYA ALI.

Govinda Rao, *In re* .. *Petitioner.**

Letters Patent (Madras), clauses 15 *and* 44—*Clause* 44 *if abrogates clause* 15—*Appeal against judgment of single Judge in second appeal—Necessity for certificate of fitness for appeal.*

By clause 15 of the Letters Patent (Madras) it is necessary that the Judge who has passed the judgment in a second appeal shall certify it as a fit case for appeal in order that an appeal under that clause may lie. It cannot be suggested that clause 44 in any way abrogates the effect of clause 15.

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1. 55 L.J. P. 7.

* C. M. P. No. 569 of 1946. 11th February, 1946.

Petition under clause 44 of the Letters Patent praying that in the circumstances stated therein the High Court will be pleased to give a ruling that a Letters Patent Court can admit an appeal either without or in spite of the refusal and the leave to a party by a concerned Judge of the High Court to a Letters Patent Appeal (S. A. Nos. 152 and 153 of 1941, High Court—A. S. Nos. 26 and 8 of 1913, District Court, Bellary—O. S. Nos. 113 and 322 of 1941, District Munsiff Court, Hospet).

The Petitioner in person.

The Court made the following

ORDER :—By clause 15 of the Letters Patent it is necessary that the Judge who has passed the judgment in a second appeal shall certify it as a fit case for appeal in order that an appeal under that clause may lie. It is suggested that clause 44 somehow abrogates the effect of clause 15. We are unable to appreciate this contention. The petition is rejected.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Devaki Antarjanam and others .. *Appellants**

v.

P. Mariyakutti Umma and another .. *Respondents.*

Court-Fees Act (VII of 1870 as amended in Madras), section 7 (iv-A)—Malabar Nambudiri Illom—Sale by karnavan for himself and as guardian of daughter—Suit to avoid by mother, wife and daughter—Relief of cancellation if necessary—Court-fee payable.

The karnavan of a Numbudiri Illom executed a sale deed of properties already covered by a mortgage purporting thereunder to act for himself as karnavan of the Illom and also as guardian of his minor daughter. The sale deed also purported to be executed by the mother and wife of the karnavan. The mother and wife, as well as the daughter sued for redemption of the mortgage ignoring the sale deed. The former contended that they did not execute the sale deed and that the signatures on the document were forged, while the latter contended that the document was not binding on her. The lower Court held that the suit was for setting aside the alienation and directed plaintiffs to value the suit as one for cancellation of the deed.

Held, that so far as the mother and wife were concerned it was not necessary to ask for cancellation of the deed as they were not parties to the document.

Held further, that as regards the daughter, inasmuch as she was represented by her legal guardian it was necessary to apply for the relief of cancellation to the extent of her share and that court-fee was payable on that basis.

Appeal against the decree of the District Court, South Malabar, in A. S. No. 310 of 1944, preferred against the decree of the Court of the District Munsiff, Ponnani, in O. S. No. 645 of 1943.

S. Venkatachala Sastri for Appellants.

P. Govinda Menon and the Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT :—The only question arising for consideration in the second appeal is whether the plaint has been properly valued and whether the requisite court-fee has been paid. The suit is by plaintiffs 1 to 4 who are members of the Nambudiri Illom. The second defendant is the karnavan and the suit is for redemption of a mortgage executed in favour of one Vasudevan Somayajipad. Ex. D-1 is that mortgage and it was a possessory mortgage for Rs. 600. After the death of Vasudevan Somayajipad his son assigned it in favour of the first defendant in the suit. The second defendant karnavan executed the sale deed of the properties covered by the mortgage, Ex. D-1, in favour of the first defendant. That sale deed is Ex. D-2 dated 14th January, 1937. Under that document he purported to act on behalf of himself as karnavan, of the illom and also as guardian of his minor daughter

* S. A. No. 1640 of 1945. 2nd April, 1946.

the third plaintiff in the suit. Ex. D-2 purports to be executed by plaintiffs 1 and 2 as well who are the mother and wife of the second defendant. In their plaint in the present suit the plaintiffs asked for redemption of the mortgage Ex. D-1 and attacked Ex. D-2 the sale deed as not binding upon them. For plaintiffs 1 and 2 it is said that they were not parties to the document, that they did not execute the sale deed, that the signatures found on that document are not theirs and that they have been forged. As regards the third plaintiff it is said that the document is not binding on her. The fourth plaintiff was not represented in the document as he was born subsequently. The lower Courts have held that in fact the suit is for setting aside the alienations made by the second defendant and directed the appellants to value the suit as one for cancellation of Ex. D-2, and pay court-fee thereon. That order not having been complied with the plaint was rejected on the ground that the plaint was not properly stamped. On appeal the Subordinate Judge confirmed the order of rejection by the trial Court and hence the second appeal. So far as plaintiffs 1 and 2 are concerned it is clear that they cannot be asked to amend the plaint by asking for cancellation of Ex. D-2 and pay court-fee thereon. It has been held by this Court in *Ramaswami* v. *Rangachariar*[1] that it is not necessary for persons who are not parties to the document to ask for cancellation of the document.

"The other transactions of the first defendant, whether the plaintiff is made a party thereto or not, stand on a different footing. He is not bound under the substantive law by which he is governed, to sue for a declaration or cancellation in respect of any of them. The legal position has been correctly explained in *Unni* v. *Kunchi Amma* [2] in the following words which were taken from an unreported decision of this Court :

'If a person not having authority to execute a deed or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it, to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist' . . . .

In such cases even if the plaint contains a prayer for a declaration or cancellation, there is good reason for holding it to be one for a purely incidental, but unnecessary relief. As I have indicated there is no such prayer in the plaint and in the light of the principles explained there is no justification for implying them and then demanding a fee for it."

The order of the lower Court directing plaintiffs 1 and 2 to amend the plaint by asking a declaration that the sale deed Ex. D-2 is not binding upon them is obviously untenable. As regards the third plaintiff however she was represented in the document by her legal guardian. In such cases it has been held in *Putta Venkatakrishnayya* v. *Sheik Ali Sahib and others*[3], that she is bound to ask for cancellation of the document and also pay court-fee on her share of the properties covered by the document.

The decrees of the lower Courts are therefore set aside and the suit is remanded to the trial Court with the following directions.

If the plaintiffs wish to retain third plaintiff as a plaintiff in the suit then they must amend the plaint by asking for cancellation of Ex. D-2 as regards the third plaintiff's share and pay court-fees under section 7, clause (iv-A) of the Court-Fees Act on the share of the third plaintiff in the properties covered by Ex. D-2. Four weeks time will be allowed for this purpose from the date of reopening of the Court after summer holidays but if the third plaintiff is not prepared to pay Court-fee required for cancellation then they are given liberty to ask for the amendment of the plaint by transposing the third plaintiff as a defendant. The suit will in any event proceed as regards plaintiffs 1, 2 and 4. The costs of the parties incurred here and in the lower appellate Court will be provided for in the revised decree of the trial Court. The court-fee paid on the memorandum of second appeal and the memorandum of appeal in the lower appellate Court will be refunded.

Leave to appeal is refused.

B.V.V. ——— *Appeal allowed.*

1. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 at pp. 279 and 280 (F.B.).
2. (1890) I.L.R. 14 Mad. 26.
3. (1938) 48 L.W. 277.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Banti Lakshmi Naidu (deceased) and others .. *Appellants**

v.

Mantha Gumpa Someswararao .. *Respondent.*

Occupancy rights—Minor inams—Mere long possession by tenant paying uniform rent—No proof of occupancy right.

The tenants of an enfranchised pre-settlement minor inam have been in long possession of the land paying a uniform rent. In a suit for ejectment by the landlords the tenants set up occupancy rights.

Held, that the onus of proving that they had occupancy rights is on the tenants and mere long possession by a ryot paying a uniform rent is not by itself enough to prove that he acquired a permanent right of occupancy, and much more so where the tenants have expressly undertaken to quit at the end of the term.

Nainapillai Marakayar v. *Ramanathan Chettiar*, (1923) 46 M.L.J. 546 : L.R. 51 I.A. 83 : I.L.R. 47 Mad. 337 (P.C.), followed.

Appeal against the decree of the District Court, Vizagapatam, in A. S. No. 64 of 1944, preferred against the decree of the Court of the District Munsiff, Parvatipur in O. S. No. 262 of 1940.

P. Satyanarayana Rao for Appellants.

P. Somasundaram and *P. Suryanarayana* for Respondent.

The Court delivered the following

JUDGMENT.—The appellants are defendants in a suit for ejectment brought by the plaintiff-respondent. The main defence is that the defendants have permanent rights of occupancy. The suit land is an enfranchised pre-settlement minor inam and is not governed by the provisions of the Madras Estates Land Act. There is, in fact, no plea that occupancy rights have been obtained under the Madras Estates Land Act. The only question therefore is whether apart from the Act the defendants have proved that they have permanent right of occupancy, or, in other words, whether they are permanent lessees. They relied upon a number of documents to show that on some occasions the then owners of the plaint property expressly granted occupancy rights; but those documents have been found by the District Judge to be not genuine. The learned advocate for the appellants argues that this finding is not satisfactory. But I do not see any ground for interference in second appeal as this is a finding of fact. The appellants then relied upon a compromise said to have been entered into between the then owner and the ryots in a litigation of 1929. It is said that when that suit was pending in appeal, the parties entered into a compromise by which occupancy rights were recognised, that a compromise petition was drawn in triplicate and that one copy was entrusted to the landlord to be filed into Court. They say that contrary to the understanding, the landlord did not file the copy into Court. They produced the copy which, it was said, was given to them. Unfortunately, this document has been found to be not genuine by the appellate Court. The trial Court, no doubt, found it to be genuine, but the appellate Judge has given good reasons to find that the document is not genuine. I cannot say that the finding of the lower appellate Court is open to any attack. Acquisition of occupancy rights under documents alleged to have been executed by the landlords is not established.

The only other point is whether the tenants have proved by other evidence that they have acquired such a right. The lower appellate Court has pointed out that all that the defendants proved is that they have been in possession for a long time, paying probably a uniform rent of Rs. 100. The rent was enhanced to Rs. 125 under Ex. P-10 of the year 1932. This document, Ex. P-10, was denounced as a forgery by the tenants and was found to be a forgery by the trial Court. But

* S. A. No. 1824 of 1944. 18th April, 1946.

the appellate Court found that it is genuine. So, it is not even a case where until the date of suit the tenants have been paying an unvarying rent for all time. It was then said that the ryots had been alienating the properties. The alienations proved are only three mortgages. Of these one of the year 1915 and another of 1927 are both unregistered. The last is a registered mortgage of 1927. As the appellate Judge has pointed out, there is nothing to show that the landlord was ever aware of these transactions. These are only possessory mortgages which were redeemed by the tenants and there are no cases of sales effected by the ryots. Three such documents spread over a period of 12 years, none before and none after—do not prove a permanent right of occupancy. As held by the Judicial Committee in *Nainapillai Marakayar* v. *Ramanathan Chettiar*[1] long possession by a ryot paying a uniform rent is not by itself enough to prove that he acquired a permanent right of occupancy. Their Lordships say this at page 344 :

"It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. In *Secretary of State for India in Council* v. *Lachmeswar Singh*[2], it was held that the onus of proving that they had a permanent right of occupancy in lands was upon the defendants, who alleged it as a defence to a suit by their landlord to eject them, and that proof of long occupation at a fixed rent did not satisfy that onus."

In this case, leaving aside Ex. P-10 of the year 1932, we have nothing more than long occupation at a uniform rent. This, as pointed out by their Lordships of the Judicial Committee, is not enough and there are no other facts proved. We have, on the other hand, documents, Exs. P-8 series, in which the tenants have expressly undertaken to quit at the end of the term covered by those documents. Such a term is inconsistent with permanent rights of occupancy. I see no reason to differ from the conclusions arrived at by the learned District Judge and I dismiss the second appeal with costs of the plaintiff-respondent.

No leave.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE SHAHABUDDIN.

Neeladri Appadu and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), section 421—Jail appeals—Court cannot entertain fresh appeal by counsel on a matter that had already been disposed of in an earlier jail appeal by the same party—Revisional powers—Exercise of.

The practice of the Madras High Court has been for not allowing a jail appeal by counsel on a matter that was already disposed of under section 421 of the Criminal Procedure Code. The Court is *functus officio* where an appeal has been disposed of, and cannot hear the appeal again.

In re *Kunhamad Haji*, (1922) 44 M.L.J. 450 : I.L.R. 46 Mad. 382 and In re *Somu Naidu*, (1923) 46 M.L.J. 456 : I.L.R. 47 Mad. 428 followed.

Lachhman Chamar v. *Emperor*, A.I.R. 1934 All. 988 (1) not followed.

In a case it was alleged that the respondents were persons coming under clauses (*a*) and (*f*) of section 110 of Criminal Procedure Code and were ordered to furnish security and upon failure to comply with that order they were committed to prison to undergo rigorous imprisonment. An appeal against the order was received from jail and the Sessions Judge dismissed it summarily under section 421. Another appeal was presented by the same respondents through counsel against the same order already appealed against and the Sessions Judge not knowing that the same matter had already been disposed of by him under section 421 passed orders setting aside the order as regards respondents 1 and 2 and confirming as regards third respondent.

Held, that the order of the Judge in the later appeal was without jurisdiction and therefore should be set aside.

Held further, that though normally the order dismissing the earlier appeal of the respondents should stand still in view of the conclusion in the later, in the exercise of the Court's powers of revision, the order in the earlier appeal should be revised by allowing it in regard to respondents 1 and 2 and dismissing it only against the third respondent.

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1. (1923) 46 M.L.J. 546 : L.R. 51 I.A. 83: I.L.R. 47 Mad. 337 (P.C.).

2. (1888) L.R. 16 I.A. 6 : I.L.R. 16 Cal. 223 (P.C.).

* Cr. R. C. No. 116 of 1946. 19th March, 1946.

(Case Referred No. 5 of 1946.)

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the Sessions Judge of Vizagapatam division in his letter dated 16th Jannury, 1946, in C.A. Nos. 132 and 154 of 1945, on his file (H.C.J. No. 1126 of 1946).

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Crown.

Petitioners not represented.

The Order of the Court was delivered by

Shahabuddin, J.—This is a reference by the Sessions Judge of Vizagapatam in respect of C. A. Nos. 132 and 154 of 1945, in his Court, which were filed by the respondents against the order of the Sub-Divisional Magistrate of Vizianagaram in M. C. No. 38 of 1945 on his file. In that case, it was alleged that the respondents were persons coming under clauses (*a*) and (*f*) of section 110 of the Code of Criminal Procedure, and that they should be called upon to furnish security for good behaviour. The Magistrate believed the evidence adduced by the prosecution and directed the respondents to execute bonds in the sum of Rs. 100 with two sureties each, and as they failed to do so, he committed them to prison to undergo rigorous imprisonment for one year each. C. A. No. 132 of 1945 against this order was received from jail on 11th October, 1945, and the learned Sessions Judge dismissed it summarily under section 421 on the 19th October, 1945. On the 23rd November, the other appeal was presented in Court by counsel on behalf of the same respondents against the same order. This was taken on file on 27th November, and notice was issued the same day. The learned Judge, after hearing the case on merits, set aside the order of the Magistrate as far as respondents 1 and 2 were concerned and confirmed it as against the third respondent. When he dealt with the later appeal, No. 152 of 1945, it was not brought to his notice that the same matter had already been disposed of by him under section 421 of the Criminal Procedure Code. Discovering this later, he has made this reference. His letter of reference does not indicate which of the two decisions he wants to be upheld. He however refers to a decision of the Allahabad High Court in *Lachhman Chamar* v. *Emperor*[1], stating that, according to that decision, the dismissal of a jail appeal under section 421 of the Code does not bar the hearing of an appeal filed by counsel in the same matter.

The order in the later appeal was in our opinion an order passed without jurisdiction. It is no doubt true that the decision of the Allahabad High Court referred to by the learned Judge, does contain observations in support of the view that the dismissal of a jail appeal does not bar the hearing of the appeal in the same case on merits, but these observations were based on the practice obtaining in that Court. It is, however, clear that the practice in this Court has been otherwise. In In re *Kunhamad Haji*[2], a Bench of this Court held that, where an appeal has been disposed of, the Court is *functus officio* and cannot hear the appeal again. The same view was taken by another Bench of this Court in In re *Somu Naidu*[3]. Following these two decisions, with which we respectfully agree, we hold that the order of the learned Judge in the later appeal was one without jurisdiction and has, therefore, to be set aside.

In view of this conclusion, the order dismissing the earlier appeal of the respondents should normally stand; but, having gone through the judgment in the later appeal, we find that the learned Judge had strong reasons for not accepting the case for the prosecution as far as respondents 1 and 2 were concerned. In the circumstances, we consider that ends of justice require our interference. We, therefore, in the exercise of our powers of revision, revise the order in the earlier appeal by allowing it as far as respondents 1 and 2 are concerned and setting aside the order of the Magistrate as against them. The order dismissing the appeal of the third respondent will stand. Respondents 1 and 2 will be released forthwith.

K.C. ——— *Conviction set aside as regards Respondents 1 and 2.*

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1. A.I.R. 1934 All. 988 (1).
2. (1922) 44 M.L.J. 450 : I.L.R. 46 Mad. 382.
3. (1923) 46 M.L.J. 456: I.L.R. 47 Mad. 428.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

S. Murugesa Gramani .. *Appellant**

v.

The Province of Madras represented by the Collector of Madras .. *Respondent.*

Madras City Tenants Protection Act (III of 1922)—Applicability to lease of land by the Government—Crown Grants Act (XV of 1895), section 3—Scope and effect—If prevails over City Tenants Protection Act—Receipt of rent by karnam *subsequent to re-entry—If binds Government.*

Section 3 of the Crown Grants Act provides that notwithstanding anything contained in any statute or enactment of the Legislature the terms of the grant should be given effect to. Accordingly the Crown Grants Act prevails over the Madras City Tenants Protection Act and the terms of a lease by the Government should be enforced. The lessee is bound by the covenant in the lease to yield up the demised premises with the fixtures and additions thereto in good and tenantable repair and condition at the termination of the lease by efflux of time or earlier determination for any other cause. The lessee in such circumstances will not be entitled to claim the benefits of the Madras City Tenants Protection Act. The receipt of rent of the premises by the *karnam* subsequent to re-entry by Government will not bind the Government.

Difference between powers of private agents and public agents to bind their principal by their acts pointed out.

Secretary of State for India in Council v. *Kasturi Reddi*, (1902) 12 M.L.J. 453 : I.L.R. 26 Mad. 268 at page 279, relied on.

Appeal against the decree of the City Civil Court, Madras, in O. S. No. 1151 of 1942.

K. E. Rajagopalachari and *P. B. Ananthachari* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) instructed by the Crown Solicitor for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit filed by the appellant for a decree restraining the defendant-respondent by an injunction from interfering with the appellant's right to the suit land and for a declaration that he is entitled to the reliefs provided under Madras Act III of 1922 (Madras City Tenants Protection Act). The appellant's father was granted a lease of a plot of land measuring 180 square feet in Perambur within the city of Madras. This was in the year 1917 and the monthly rent was Rs. 5. After the death of the father successive leases were granted by the respondent from time to time. In 1934, the appellant requested the Government to assign the land to him but the Government refused. A similar request was made in 1935 and that again was turned down. In May, 1941, the respondent terminated the lease on the ground that one of the conditions of the lease was violated and that the lease contained a provision for forfeiture and re-entry. The lease that was current at that time was that under Ex. D-23 which ran from 1st July, 1938, up to the 30th June, 1941. A notice informing the appellant that his lease was forfeited and asking him to quit was given on the 14th May, 1941, Ex. D-24. The Collector also ordered the Tahsildar to take immediate action to evict the lessee and to re-enter upon the land. The Tahsildar took possession of the land on the 27th July, 1941. The Tahsildar has given evidence to this effect and his evidence has been accepted by the lower Court. Though the appellant denies that the Tahsildar took possession on the 27th July, 1941, I see no reason to differ from the finding of the lower Court on this question.

On the 30th July, 1941, the karnam accepted a sum of Rs. 5 and gave a receipt Ex. P-13 (*b*). It purports to be a receipt for the lease rent for the month of July, 1941. Subsequently there were proceedings under the Land Encroachment Act and when the proceedings were going on, the suit under appeal was started on the 1st July, 1941, for the reliefs mentioned above. It would appear that subsequent to the date of the plaint, the superstructure put up by the appellant was removed by the respondent and thereafter damages were asked as regards the value of the buildings.

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* C. C. C. A. No. 46 of 1945. 2nd April, 1946.

Various claims were put forward in the plaint; one is that the appellant is a tenant under the Madras City Tenants Protection Act and therefore entitled to the benefits conferred by that Act. Under section 2 (4) of the Act, a tenant means

"tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy."

If this Act applies, then the appellant cannot be evicted except in accordance with the provisions of that Act and he would be entitled to a declaration that the respondent should not disturb his possession except by proceedings under that Act. But the respondent relies upon section 3 of the Crown Grants Act which says—that notwithstanding anything contained in any statute or enactment of the Legislature, the terms of the grant should be given effect to. The section runs thus:

"All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor any rule of law, statute or enactment of the legislature to the contrary notwithstanding."

It is clear therefore that the Crown Grants Act prevails over the City Tenants Protection Act and that being so, the terms of the grant Ex. D-23 have to be enforced. Ex. D-23 provides that the lease comes to an end on the expiry of the three years from that date. It contains this stipulation:

Clause 2, sub-clause (9). "And at the expiration or sooner determination of the said vacancy to yield up the demised premises with the fixtures and additions thereto in good and tenantable repair and condition in accordance with the covenants hereinbefore contained."

Therefore, the lessee-appellant is bound by the covenant I have set out and he has no right to be in possession after the expiry of the period fixed under the document.

Mr. P. B. Ananthachari, the learned Advocate for the appellant, then urges that rent was collected from his client for the month of July, 1941, that is, for a period after the expiry of the lease Ex. D-23. And the argument is that acceptance of rent for a period after the expiry of the term creates at least a tenancy from month to month. If so the respondent cannot evict him unless due notice was given. My attention has not been drawn to any notice given subsequent to the 30th July, 1941, which would conform to the requirements of the law on this point. 15 days notice evidently has to be given under the general law in the case of monthly tenancies. There is no such notice in this case. The learned Government Pleader replies that though the karnam received the rent for July, 1941, and gave the receipt Ex. P-13 (*b*), his act cannot prejudice the rights of the respondent and reliance is placed on the decision of this Court in *Secretary of State for India in Council* v. *Kasturi Reddi*[1], where the distinction between private agents and public agents are discussed at length. The learned Judges said this:

"The distinction as to the extent to which acts and declarations of a private agent bind his principal and those of public agents bind the Government is well pointed out by Story in his 'Law of Agency' (Ninth edn., 1882), section 307 (*a*) in the following terms:—

"In respect to the acts and declarations and representations of public agents it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter the principals are in many cases bound where they have not authorised the declarations and representations to be made. But in the case of public agents, the Government or other public authority is not bound unless it manifestly appears that the agent is acting within the scope of his authority or he is held out as having authority to do the act or is employed in his capacity as public agent to make the declaration or representation for the Government. Indeed this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake or rashness and indiscretion of their agents. 'By the law of agency at the common law there is difference between individuals and the Government—the former are liable to the extent of the power they have apparently given to their agents, while the Government is liable only to the extent of the power it has actually given to its officer.' (footnote). And there is no hardship in requiring from private persons dealing with public officers, the duty of inquiry as to their real or apparent power and authority to bind the Government. . . ."

Applying the rule laid down in this decision I must hold that the karnam had no right to bind the respondent by his act of collecting the rent for July, 1941. Even if the Tahsildar himself had collected the rent, his act would not bind the Government particularly after he was told by the Collector in Ex. D-24, to re-enter upon

1. (1902) 12 M.L.J. 453: I.L.R. 26 Mad. 268 at page 279.

the land and to take possession of it. He was distinctly told that the lease had been cancelled and that he should re-enter upon the land and take immediate steps to evict the lessee from the site. Even if the Tahsildar was a private agent, if the agent was distinctly told to take possession and to re-enter upon the land on the ground that the lease had been cancelled by the principal, if the agent subsequently accepts rent, it would not bind the principal as the agent's power to collect rent from the lessee would stand put an end to by such a direction given by the principal.

Lastly it is urged that the amount realised by the sale of the building materials may at least be refunded. But the clause in the lease deed set out above entitles the respondent to the fixtures and additions to the property. No doubt the respondent had asked the appellant to remove those materials, but the appellant did not choose to do so. Now it is too late to ask for this relief in the face of the covenant contained in the document. Though the plaint averred that by receipt of rent on the 30th July, the tenancy of the appellant still continued, the respondent did not in his written statement plead that the Karnam's act was not binding on the respondent. But that being a pure question of law, I allowed it to be raised here. The appeal is therefore dismissed; but under the circumstances I do not make any order as to costs of the appeal. The order as to costs made by the lower Court will stand.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Brahadeeswara Mudaliar .. *Appellant**

v.

Rajagopal Pillai .. *Respondent.*

Hindu Law—Succession—Estate of dancing girl—Preferential rights of daughter over sons—Custom varying such right—Essentials.

Practice—Concurrent finding as to existence of custom—Interference on second appeal.

The general rule of succession to the estate of a dancing girl is that daughters are preferred to sons, her property being treated as stridhanam. *Subbaratnam Mudali* v. *Balakrishnaswami Naidu*, (1917) 33 M.L.J. 207; *Balasundaram* v. *Kamakshi Ammal*, (1936) 71 M.L.J. 785 : I.L.R. 1937 Mad. 257 and *Gangamma* v. *Kuppammal*, (1938) 2 M.L.J. 923 : I.L.R. 1938 Mad. 789, relied on. The decision in *Bera Chandramma* v. *Chandram Naganna*, (1923) 45 M.L.J. 228, that there is a custom in the caste of dancing girls by which sons and daughters share the inheritance equally, cannot be deemed to apply beyond the Vizagapatam district. It cannot support an alleged custom in the Madura district.

Questions of the existence of ancient custom are generally questions of mixed law and fact, the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether, those facts so found satisfy the requirements of law. This latter is a question of law—not fact. There can be an interference with concurrent findings of two Courts on such a matter to find out if the evidence is sufficient to prove the custom alleged. To establish custom the finding must be that an ancient custom such as modifies the law existed in the locality. Moreover, where there is no pleading as to alleged custom evidence as to it should not be let in at all.

Palaniappa Chetti v. *Sreemath Devasikamani Pandara Sannadhi*, (1917) 33 M.L.J. 1 : L.R. 44 I.A. 147 : I.L.R. 40 Mad. 709 at 721 (P.C.), relied on.

Appeal under clause 15 of the Letters Patent against the judgment of Byers, J., dated 3rd January, 1946, in S.A. No. 232 of 1945 against A.S. No. 82 of 1943, of the Subordinate Judge's Court, Dindigul—on appeal from O.S. No. 185 of 1942, of the District Munsiff Court, Palni.

N. K. Mohanarangam Pillai, *M. V. Gopalaratnam* and *R. Krishnaswami* for Appellant.

The Advocate-General (*K. Rajah Aiyar*) and *K. S. Ramamurthi* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is the grandson of a dancing girl. He sued in the Court of the District Munsiff of Palni for a decree for partition of his grandmother's estate. He claimed a half share in the property by right of inheritance. The general rule of succession to the estate of a dancing girl is that the daughters are preferred to sons, her property being treated as *stridhanam*. In this case the

* L. P. A. No. 12 of 1946. 24th April, 1946.

plaintiff's grandmother had a son and a daughter. The plaintiff is the son of the son. Notwithstanding that he had not pleaded that he was entitled to a half share in his grandmother's estate by reason of custom, the District Munsiff allowed evidence to be led in proof of custom and this in spite of the fact that he himself had refused to allow the plaint to be amended by the inclusion therein of a plea of custom. The evidence which the plaintiff adduced on this question was that of a relation, two pipers from a temple in Palni and a weaver residing there. This evidence was accepted by the District Munsiff as establishing the custom and he gave the plaintiff a decree for partition. On appeal this decision was concurred in by the Subordinate Judge of Dindigul. The second defendant, an alienee of property from the daughter of the dancing girl appealed to this Court. The appeal was heard by Byers, J., who considered that the evidence on record was not sufficient to establish the custom and consequently allowed the appeal. The plaintiff has appealed against the learned Judge's judgment under clause 15 of the Letters Patent.

In *Palaniappa Chetti* v. *Sreemath Devasikamani Pandara Sannadhi* [1], the Privy Council had to consider the position where there had been concurrent findings on the question of custom and their observations are very relevant here. They said :

"It has, however, been pressed on behalf of the appellants that there are two findings : one by the Munsiff and one by the Subordinate Judge, who agrees with him that the ancient custom relied upon has been proved, and that, as that is an issue of fact, it must be accepted. No doubt two findings upon questions of pure fact must be accepted by this Board, but questions of the existence of ancient custom are generally questions of mixed law and fact ; the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact. The second answer is that neither of these Judges has found that any ancient custom such as modifies the law, existed in this locality. The Munsiff sets out the finding he arrived at in these words :—

'I must find that for a very long time, permanent leases of temple land are being granted, and that the alienees are in undisputed possession thereof'."

The Subordinate Judge states his finding in these words :

'If custom were needed to justify such a grant, the District Munsiff has found upon the evidence (and I agree in his finding) that such local usage does obtain in the village in question. The custom is perfectly reasonable, and is not opposed to public policy.'

There could scarcely be a more glaring instance of the misapplication of the word 'custom' or a more remarkable instance of forgetfulness of essentials of a custom which modifies the ordinary law."

In *Subbaratnam Mudali* v. *Balakrishnaswami Naidu* [2] *Balasundaram* v. *Kamakshi Ammal* [3] and *Gangamma* v. *Kuppammal* [4], this Court held that the property of a dancing girl devolves upon her female issue in preference to her male issue. It is true that in *Bera Chandramma* v. *Chandram Naganna* [5], Schwabe, C.J. and Coleridge, J., held that there is a custom in the caste of dancing girls by which sons and daughters share the inheritance equally. This decision was based on an observation in Thurstan's Castes and Tribes of Southern India. Byers, J., has pointed out in his judgment that the statement in this work was taken from a census report fifty years ago. Even if it is accepted, the decision in *Bera Chandramma* v. *Chandram Naganna* [5], cannot be deemed to apply beyond the Vizagapatam district. It cannot be held to support an alleged custom in the Madura district. We are certainly not prepared to accept *Bera Chandramma* v. *Chandram Naganna* [5] in preference to the other decisions of this Court on this question.

In view of what the Judicial Committee said in *Palaniappa Chetti* v. *Sreemath Devasikamani Pandara Sannadhi* [1], it cannot be held that the testimony in this case is sufficient to establish the custom which must be ancient, certain and reasonable. Moreover, the evidence should not have been admitted at all.

The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

1. (1917) 33 M.L.J. 1 : L.R. 44 I.A. 147 : I.L.R. 40 Mad. 709 at 721 (P.C.).
2. (1917) 33 M.L.J. 207.
3. (1936) 71 M.L.J. 785 : I.L.R. 1937 Mad. 257.
4. (1938) 2 M.L.J. 923 : I.L.R. 1938 Mad. 789.
5. (1923) 45 M.L.J. 228.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA AND MR. JUSTICE YAHYA ALI.

Thatha Amma *alias* Rugmani Amma & others .. *Appellants**

v.

Thankappa *alias* Madhava Mannadiar & others .. *Respondents.*

Malabar Law—Marumakkathayam family—Gift to or purchase of property in the name of wife and children—Separate or tarwad property—Presumption—Acquisition by junior members of tarwad—Presumption as to.

Madras Marumakkathayam Act (*XXII of* 1933), *section* 48—*Scope and effect.*

The Madras Marumakkathayam Act applies only to transactions after the 1st August, 1933, when the Act came into force. Even section 48 of the Act applies only to cases of gifts or purchases in the name of (1) the wife alone and (2) the wife and one or more of his children by such wife together. Apart from the Act, where property is gifted to the wife alone or to some of the children alone there is no presumption that the donees take it with the incidents of tarwad property as it cannot be presumed to be a gift to the entire tavazhi. The presumption will arise only if the gift was in favour of the wife and children or in favour of all the children who by themselves form a tavazhi. The position is the same in the case of acquisitions by the father in the name of one or more children.

The property acquired by a junior member is to be presumed to be his own separate acquisition and it lies on the party setting up that it is tarwad property to prove that it was an acquisition on behalf of the tarwad. The presumption that applies in the case of a joint Hindu family ought not to be applied to the case of Malabar tarwads.

Authorities discussed.

Appeals against the decree of the Court of the Subordinate Judge of South Malabar at Palghat dated 31st January, 1944, and passed in O.S. Nos. 29 of 1941 and 43 of 1943 respectively.

T. V. Muthukrishna Iyer, *D. A. Krishna Variar*, and *Ravi Varma*, for Appellant.

B. Sitarama Rao and *K. P. Raman Menon*, for Respondents.

The Court delivered the following

JUDGMENT :—Plaintiffs appeal against the decree of the Subordinate Judge of Palghat in O.S. No. 29 of 1941. Though the suit is one for maintenance, the questions that were tried in the Court below and which are to be decided here relate to the title of the contesting defendants to various properties which are claimed by them as their exclusive and separate properties. The quantum of maintenance depends on what the family properties are and for that purpose it has become necessary to decide whether the properties claimed by each defendant or each set of defendants are really his or their separate properties. The first plaintiff is the sister of the first defendant and the other plaintiffs are her children. The plaintiffs and defendants 1 to 16 are members of a tavazhi of which the first defendant is the karnavan. First plaintiff, defendants 1 to 6 and defendants 8, 9 and 10 are the children of their mother the 7th defendant. The 7th defendant and her children and grandchildren by the daughters are members of the tavazhi. As the eldest male member, the first defendant is the karnavan of the tavazhi.

There are thirteen items which are claimed in the plaint as being the family properties. The usufructuary right in item 1 and the third item are admitted by the defendants to belong to the family and the appellants have been given maintenance from the income of these properties. The first respondent has purchased the jenm right in the first item and claims that right to be his exclusive property. The present suit being only one for maintenance, the lower Court left open the question whether jenm right of item 1 belongs to the family or whether it is the exclusive property of the first defendant as the income of the property belongs to the family until redemption of the usufructuary mortgage. We think that this is a proper course to take. Items, 2, 4 and 11 comprise the right to the usufruct from certain trees on some lands and the income therefrom is negligible.

The fight centred round items 5 and 6 which are claimed by the first defendant, item 7 claimed by the third defendant, items 8 and 13 claimed by defendants 1

* Appeal Nos. 440 and 441 of 1944. 14th March, 1946.

and 2 as thier joint property, items 9 and 10 claimed by the second defendant and item 12 claimed by the seventh defendant the mother. These properties were found by the lower Court to belong to the several claimants. The plaintiffs appeal and the question is whether the lower Court's finding that the properties are the separate properties of the several defendants is correct.

The seventh defendant had married one Kandar Mannadiar who was a member of a very rich tarwad. During the last years of his life he was also the karnavan of his tarwad. The seventh defendant and her children do not belong to his tarwad being members of a different tarwad. The attempt of every karnavan ordinarily is to save as much as he can from the properties of his tarward for the benefit of his wife and children who have no claim on his tarwad. It is said that Kandar Mannadiar made a gift of some properties to the first defendant and found the money for the purchase of several other items in dispute. It is urged that under Marumakkathayam law which governs the parties, if a husband or a father makes a gift to his wife and children or to his wife alone or to one or more of his children or when he makes a purchase in the name of one or others abovementioned, the presumption is that the property is held as the joint property of the tavazhi of the wife and his children by that wife, and that the presumption is to be rebutted by the person setting up an absolute right to the property by proof that the husband or father intended that he, she or they should take the property as his, her or their exclusive absolute property. It is also said that purchases made by a Karnavan or by the junior members of a Malabar Tavazhi or Tarwad should be presumed to be Tarwad properties until the contrary is established. The chief question involved in this appeal is whether this view of the law is correct and if so how far the presumption in favour of the property being the tavazahi property is rebutted by the various claimants.

We shall first take up the question whether there is a presumption under the Marumakkathayam law that the property given by a husband to his wife and children or to his wife alone, or to one or more of his children is a gift to the entire tavazhi. With this is connected the question whether a property acquired by the husband in the name of the wife or child is to be presumed to be on behalf of the tavazhi to which the wife or child belonged. This question has been the subject of several decisions. It has been to some extent set at rest by the Legislature.

Section 48 of the Madras Marumakkathayam Act (XXII of 1933) enacts :

> "Where a person bequeaths or makes a gift of any property to, or purchases any property in the name of, his wife alone or his wife and one or more of his children by such wife together, such property shall unless a contrary intention appears from the will or deed of gift or purchase or from the conduct of the parties, be taken as tavazhi property by the wife, her sons and daughters by such person and the lineal descendants of such daughters in the female line."

This Act is not retrospective and applies only to transactions after the 1st August, 1933 when the Act came into force. Section 48 applies only to cases of gifts to or purchases in the name of (1) the wife alone or (2) the wife and one or more of his children by such wife together. So, if there is a gift to or a purchase in the name of one or more of the children alone, or in favour of all his children but not in favour of his wife also, the rule enacted in section 48 does not apply. From the provisions of this section, one would be led to infer that in other cases not covered by the two cases mentioned in the section, the presumption would be that the property belongs to the person in whose name it is acquired. But it is said on behalf of the appellants that as regards transactions which are not covered by section 48, we have to scrutinize the law as it stood before the Act and see what the law then was. It is urged that as there is no positive enactment that in cases other than those mentioned in section 48, the presumption is in favour of the person in whose name the properties gifted are acquired, the previous law on the subject has not been altered. As regards the transactions which took place prior to 1933 when the Act came into force, we have to see what the law then was.

This takes us to the consideration of the question as to what exactly is the presumption to be applied apart from the Marumakkathayam Act. In a very early decision in *Narayanan* v. *Kannan*[1], a father made a gift of some of his properties in favour of his two sons and his daughter and the terms of the gift deed were that the properties were to be enjoyed by the donees and the descendants of his daughter in the female line for ever. One of the donees contracted debts and his share was sought to be attached by a creditor of his. The question was whether the donee, the judgment debtor, had an attachable interest. The contention was that he had no power to alinenate the property as the gift was to the *tavazhi* of the donees and that therefore the attachment was illegal. The District Munsiff upheld this contention and set aside the attachment. On appeal that decision was reversed on the ground that the donees took an absolute interest as tenants-in-common. There was a further appeal to the High Court. Muttusami Aiyar and Brandt, JJ., decided that the wording of the gift deed passed an absolute estate to the grantees as tenants-in-common and that the further restriction that the land should be enjoyed by the donees and the descendants of the daughter in the female line for ever was repugnant to the absolute estate granted by the document, that therefore the donees had an absolute interest in the property and that the creditor could attach the interest of his judgment debtor. This decision was doubted in later cases on the ground that it is opposed to the principle laid down by the Judicial Committee in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[2], and *Mahomed Shumsool* v. *Shewakram*[3], that in construing a document executed by a Hindu, due weight should be given to the notions and ideas of an ordinary Hindu donor and to the ordinary method of enjoying property. As the ordinary mode of holding property in the West Coast was what may be called the tarwad or tavazhi right, *i.e.*, property to be held by a female and her children and the descendants in the female line, a donor in Malabar should be presumed to intend that the donee should enjoy the property as tavazhi property and that the decision in *Narayanan* v. *Kannan*[1], should be reconsidered, as it did not take note of this presumption. The question was referred to a Full Bench by Best and Subramania Ayyar, JJ., in *Kunhacha Umma* v. *Kutti Mammi Hajee*[4]. The appeal was heard by a Bench of four Judges of whom Muttusami Ayyar, J., was one. The judgment is a very brief one and the case itself related to a gift to one of the wives of the donor and her children. The Full Bench said this :—

"The question referred to us is whether Ayisumma and her children took the properties with the incidents of property held by a tarwad. In the case before us the donor expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption is that he intended that they should take them as properties acquired by their branch or as the exclusive properties of their own branch, with the usual incidents of tarwad property in accordance with the Marumakkathayam usage which governed the donees. This view is in accordance with the principle laid down by the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[2], *Mahomed Shumsool* v. *Shewakram*[3]. The decision in *Narayanan* v. *Kannan*[1], was not followed in *Moidin* v. *Ambu*[5], and it appears to us to be in conflict with the rule of construction indicated by the Privy Council."

The proposition laid down is that the Court should take into consideration the ordinary notions and wishes of the persons in Malabar in the position of the donor and also the ordinary incidents of property in that district. In *Mahomed Shumsool* v. *Shewakram*[3], the gift was made by a Hindu in favour of a female. There was no indication in the documents whether the grantee was to take an absolute estate or only a life estate. The Judicial Committee ruled that having regard to the ordinary notions of a Hindu testator, the presumption is that he would not ordinarily intend a female grantee to take an absolute estate and that he would like to preserve the property in the family. Unless there were words expressly granting an absolute estate, the presumption should be that the female grantee takes only a life estate. This rule of construction laid down by *Kunhacha Umma* v. *Kutti Mammi Hajee*[4], was applied to a case of gift to a person governed by Maru-

1. (1884) I.L.R. 7 Mad. 315.
2. (1857) 6 M.I.A. 526.
3. (1874) L.R. 2 I.A. 7.
4. (1893) 2 M.L.J. 226 : I.L.R. 16 Mad. 201 (F.B.).
5. S. A. 647 and 648 of 1890.

makkathayam law in *Korothi Amman Kutti* v. *Peungottil Appu Nambiar*[1]. In *Pattathuruvath Pathumma* v. *Mannamkunniyil Abdulla Haji*[2], a Moplah made a gift of some land to his wife Ayissa who belonged to a tarwad governed by the Marumakkathayam law and the question was to whom the land descended on Ayissa's death. In that case the gift was expressed to be only in the name of the wife but there was a finding by the lower appellate Court that the gift was intended both for the wife and for her children. Treating the gift as one in favour of the wife as well as her children, White, C.J. and Wallis, J., held that the case was governed by the Full Bench decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*[3] and that it was taken by Ayissa and her children with the incidents of tarwad property.

In *Naku Amma* v. *Raghava Menon*[4], Miller and Abdur Rahim, JJ., had to consider a case where again the deed of gift was clearly expressed to be to the wife and her children. Miller, J., said this :—

"Exhibits XXXIV and XIV make it clear that the gift was to her and her children and I find no warrant for construing a gift so expressed as conferring on the donee an absolute title to the property given, where, as here, the donee is the wife of the donor and a member of the Marumakkathayam tarwad."

The question then came before another Full Bench in *Chakkara Kannian* v. *Kunhi Pokker*[5]. The reference to the Full Bench was made by Sankaran Nair and Tyabji, JJ., Mr. Sankaran Nair as (he then was) had appeared in the case before the earlier Full Bench[3], and the learned Judge pointed out in his order of reference that the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*[3] should be confined to a case where the donees formed a separate tavazhi with a karnavan of its own and that it was wrongly extended to other cases as well.

In connection with gifts in favour of wife and children, is it necessary that the donees should at the time of the gift be living separately from the main tavazhi with a karnavan of its own ? Should the donees give up their interest in the main tarwad and form, so to say, an independent tarwad ? These and some other conundrums were raised after the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*[3]. As. Mr. P. R. Sundara Aiyar in his work on Malabar and Aliyasanthana Law points out at page 168—

"In *Kunhacha Umma* v. *Kutti Mammi Hajee*[3], the Full Bench however overruled the case *Narayanan* v. *Kannan*[6]. It laid down that when there is a gift by a father in favour of his wife and children there is a presumption that the property is intended to be for the benefit of the branch to be held with the incidents of tarwad poperty. This decision was by some felt to be unsatisfactory and various attempts were made to get round it. One suggestion was that it applied only to cases where the branch relinquishes its interest in the tarwad property and thereby becomes a tarwad by itself. *Kenath Puttin Veetil Tavazhi* v. *Narayanan*[7], *Ummanga* v. *Appadorai*[8]. This was qualified later on into one that the tavazhi must have been living separately. The reason given was that joint tenancy outside joint family was unknown and the only joint holding (apart from the tenancy in common) known to the law was holding by the tarwad. The genesis of this fallacy has already been traced. It was also argued that the tarwad karnavan was the person bound to maintain the members and was the lawful guardian of the minor members and what, in those circumstances was to be the position of the tavazhi karnavan ? Had he simply to draw the income and accumulate it or was he entitled like the tarwad karnavan (as was said of him in some cases) to have uncontrolled power of disposition over the income ? . . . . Another and more substantial objection was that in the case of Marumakkathayam people the possibility of the wife taking another husband and having children by him must always be present to the mind of the donor and the intention of benefitting these latter cannot be expected of him."

Some of these difficulties were pointed out by Sankaran Nair, J., in his order of reference in the Full Bench case in *Chakkara Kannan* v. *Kunhi Pokker*[5]. Several questions were referred to the Full Bench and they are set out on page 327. The question with which we are concerned is the first question which runs thus :

1. (1906) I.L.R. 29 Mad. 322.
2. (1908) 18 M.L.J. 16 : I.L.R. 31 Mad. 228.
3. (1893) 2 M.L.J. 226 : I.L.R. 16 Mad. 201 (F.B.)
4. (1915) I.L.R. 38 Mad. 79.
5. (1915) 29 M.L.J. 481 : I.L.R. 39 Mad. 317 (F.B.).
6. (1884) I.L.R. 7 Mad. 315.
7. (1905) 14 M.L.J. 415 : I.L.R. 28 Mad. 182.
8. (1910) 20 M.L.J. 268 : I.L.R. 34 Mad. 387.

"When properties are given by a person to his wife and children or children alone following the Marumakkathayam Law, do the donees constitute by themselves a tarwad or tavazhi, and if they do so, is the right of management of the properties forming the subject of the gift vested in the senior male member thereof?"

Wallis, C.J., after referring to the earlier decisions on the point and after pointing out that the Full Bench decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*[1], was followed in a number of cases gave the answer to the first question in these terms:

"The presumption is that the donees take the property with the incidents of tarwad property including those mentioned."

In his discussion the learned Judge dealt only with the case of a gift by a person to his wife and her children. In such a case he said there was a presumption that they were intended to take the properties as the exclusive properties of the branch or the tavazhi of the mother and children with the incidents of tarwad property. He says this:

"In the absence of express provision the presumption is that the property is to be enjoyed by the mother and her issue in the way in which property is customarily held and enjoyed among followers of the Marumakkathayam law. The decision *Kunhacha Umma* v. *Kutti Mammi Hajee*[1] proceeded on the authority of two decisions of their Lordships of the Judicial Committee which laid down that the law governing the parties is one of the circumstances to be taken into consideration in ascertaining the intention of the donor. As pointed out in the judgment of one of the Judges who made the reference to the Full Bench, the presumption was arrived at in consideration of what were known to be the notions and wishes of persons in the position of the donor and also of the ordinary incidents of property in the district. This view was accepted by the Full Bench of four judges two of whom Muttusami Aiyar and Wilkinson, JJ., were well acquainted with Malabar, and that it was well founded is suggested by the fact that the decision has not only been accepted but has been given a considerable extension in the neighbouring State of Travancore, as pointed out during the argument by my learned brother speaking from his experience as Chief Justice of that State."

The learned Chief Justice did not deal with the gift to the children alone though it was included in the first question that was referred to the Full Bench. Sadasiva Ayyar, J., also dealt with the question of a gift in favour of wife and children. Srinivasa Ayyangar, J., also dealt with that one question, and his answer is:

"My answer to the first question is that it is not the giving of properties by a person to his wife and children that constitutes them a tarwad or tavazhi but that if properties are given to a wife and children following the Marumakkathayam law, they as a tavazhi hold those properties with the incidents of tarwad property, and the right of management of the properties is vested in the senior male member of that tavazhi."

The discussion of all the learned Judges show this. If the donees are all the members of a tavazhi, then it may be presumed that the donor intended that the donees should take the property with the incidents attaching to tarwad property and that they were not entitled to hold it as tenants in common. Srinivasa Ayyangar, J., refers to this aspect of the case and he begins his judgment thus:

"In India, it is not uncommon for groups of persons though not incorporated to hold properties as if they were corporate entities. Castes and sub-castes hold property as such, so also village communities. But the more common and familiar instances of such groups in Southern India are the joint Hindu family governed by the Mitakshara law, the Nambudiri Illom governed by the Makkattayam law, the Nayar tarwad governed by the Marumakkattayam law, and the Aliasanthana family of South Kanara . . . . The incidents of such group holding are now well settled . . . . The Tavazhis or the subordinate groups constituting the tarwad are, I think, capable of holding properties as corporate units with the incidents of tarwad property, at the same time retaining their joint interest in the properties of the main tarwad, just as branches and sub-branches in a Mitakshara joint Hindu family are capable of holding properties with the incidents of joint Hindu family property. *I am also of opinion that some only of the members of the tavazhi cannot form a corporate unit capable of holding property as such.*"

So far there is no decision that if a property is given by a father to a wife alone or to one or more children, the property is to be held as tarwad property. The only point settled by the various decisions is that the property would be held as tarwad property if the gift is in favour of the wife and children. In the case of members of a joint family, if a gift is made to all the members who at the time of the gift constituted a joint family, the Courts have ruled that the presumption is that they take the property as members of a joint family with mutual rights of survivorship and not that they take as tenants in common. But if the donees did

1. (1893) 2 M.L.J. 226: I.L.R. 16 Mad. 201 (F.B.).

not constitute the entire joint family and were only some of the members, this presumption does not arise. Even in the case where the wife alone was mentioned in the gift deed as in *Naku Amma* v. *Raghava Menon*[1], the Court found as a fact that though her name alone was mentioned it was really a gift in favour of the wife and children. In that case there were two gift deeds: one was expressed to be to the wife and children and the other document was in favour of the wife alone. Dealing with the gift deed which was expressed to be in favour of the wife, the learned Judges were inclined to think that in the absence of expressions like "to be enjoyed by you and by your sons and grandsons for ever and ever" or some similar words it was intended by the donor as a putravakasam gift, *i.e.*, a gift for the wife and her children. Then they referred to the evidence of subsequent conduct and found that even the property which was gifted to the wife alone was treated and enjoyed by the wife and children.

The next decision is that of Coutts Trotter and Kumaraswami Sastri, JJ., in *Kuyyatil Kundan Kutty* v. *Vayalpath Ponkum*[2]. There the property was given to four sisters and though the deed was in the form of a sale it was found to be really a gift. The question was whether the donees took as tenants in common, each having an absolute right in a quarter or whether they took it with the incidents of tarwad property. The donees were the sole members of a tarwad or tavazhi and the gift was in favour of all the members of that tarwad. Coutts Trotter, J., and Kumaraswami Sastri, J., differed. Coutts Trotter, J., held that the gift was to the four ladies absolutely without the incidents of tarwad property. He based his judgment on the ground that the express right of alienation which was conferred upon the donees was in direct conflict with the idea of the property being held with the incidents of tarwad tenure the chief of which is that the property is inalienable. Kumaraswami Sastri, J., took the opposite view and after formulating the questions for decision as:

"Whether the donees under Ex. A took the property as tavazhi property with all the incidents attached to tarwad property or whether each of them took an absolute and specified fourth share,"

first considered the terms of the document and held differing from Coutts Trotter, J., that the document did not in terms confer on the donees a power of alienation and that it did not clearly indicate that the donor did not intend the donees to take it as Putravakasam property. Then he referred to the presumption that ought to be drawn in cases where there was no such clear indication in the document. He pointed out that after the decision of the Full Bench in *Chakkara Kannan* v. *Kunhi Pokker*[3] it was unnecessary to go into the earlier decisions and in the course of the judgment he said this:

"It has been argued by Mr. Sundaram that the principle enunciated by the Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee*[4] and *Chakkara Kannan* v. *Kunhi Kokker*[3] does not apply to cases where (1) the donor is not the father and (2) where the deed of gift is not expressly to the donee and *his* or *her* children. I find it difficult to see why such distinction should be drawn. The decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*[4] proceeded on the general principle enunciated by the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[5] and *Mahomed Shumsool* v. *Shewakram*[6] and if the ordinary notions and wishes of the donor may not improperly be taken into consideration in construing the nature of the estate intended to be conferred, there is no reason why the same test should not be applied to the gift by an uncle as to a gift by a father. The *ratio decidendi* of the decisions seems to be that a Hindu ordinarily intends to confer on the donee such an estate as the donee would take under the personal law governing him. The degree of propinquity is, therefore immaterial and affords no test. The case may be different where a donor not following Marumakkathayam law gives properties to those who do, but it is unnecessary to express any opinion in this appeal. It is sufficient for the purpose of this case to state that where a Marumakkathayam donor gives properties to the children of the same mother or to a member of a tavazhi without any express indication that an absolute alienable estate was granted, the presumption is that the donor intended to confer only an estate with all the incidents of tarwad property.

As regards the distinction sought to be drawn where the gift is to a person and his children and where no reference to the children is made though it is no doubt true that in several of the cases that have come up for decision to the High Court the gift was to a person and his children or

1. (1915) I.L.R. 38 Mad. 79.
2. (1916) 32 I.C. 107.
3. (1915) 29 M.L.J. 481 : I.L.R. 39 Mad. 317 (F.B.).
4. (1893) 2 M.L.J. 226 : I.L.R. 16 Mad. 201 (F.B.).
5. (1857) 6 M.I.A. 526.
6. (1874) 2 I.A. 7.

"santanams," the decisions do not turn on the presence or absence of reference to issue in the deed but on general considerations of the nature of the estate which a Marumakkathayam donor intended to confer."

This is the only decision in which we find that even if the grant is expressed to be in favour of the wife alone or in favour of children alone that the gift is to be treated as tarwad property. We are unable to find any support for the view expressed by Kumaraswami Sastri, J., in this case in any of the earlier decisions to which our attention has been drawn.

We shall now proceed to deal with the cases which are relied upon for the respondent. In *Narasammha Hegadthi* v. *Billa Kesu Pujari*,[1] Benson and Sundara Aiyar, JJ., held that the ruling in *Kunhacha Umma* v. *Kutti Mammi Hajee*[2], is not applicable where a gift purports to be only to the wife and not to the children also. No doubt in that case the terms of the gift deed were that the donee the wife was to enjoy the property from generation to generation, but the *ratio decidendi* of the decision was that the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*[2] applies to a case where the gift was to a woman and her children.

In *Duja Bhandari* v. *Venkata Bhandari*[3], a husband granted a permanent lease of his property to his wife. The deed contained no words conveying the estate to the children and the wife executed a deed of gift in respect of the major portion of these properties in favour of her two daughters, one of whom sold some of the properties to a third party and this was questioned by the daughter's children on the ground that what was granted by the permanent lease was a putravakasam right and that therefore the grantee had no right to transfer it to two of her daughters and that the daughters did not get a saleable interest under the transfer from the mother. Ayling and Seshagiri Aiyar, JJ., held that there was no presumption that the gift was with the incidents of tarwad property. The learned Judges said this:

"The argument of the learned vakil for the appellants is that the gift to Kochu by her husband is as putravakasam property and that the second defendant has no right to alienate it. Reliance was placed on *Kunhacha Umma* v. *Kutti Mammi Hajee*[2], and on the recent Full Bench decision in *Chakkara Kannan* v. *Kunhi Pokker*[4]. It is conceded that when Exhibit I was executed, the defendants Nos. 1 and 2 (daughters) were in existence, yet the gift is not made by the father to his wife and children although the words used are *makkalapaanpya*. There are no words conveying the estate to the children. In Exhibit II, Kochu deals with the properties as her self-acquisition. It is clear to our mind that the donor under these circumstances, intended to give an absolute estate to his wife. In *Narasamma Hegadathi* v. *Billa Kesu Pujari*[1], a similar gift was construed as conferring an absolute right on the donee."

In *Kaliani Amma* v. *Karthiyani Amma*[5], Devadoss, J., had to deal with a case where some property was acquired in the name of the wife. The headnote runs thus:

"Where a man gives some property to or buys some property in the name of his wife there is no presumption that he intends that she should not have absolute interest in the property but that she should hold it for the benefit of herself and her children.

The kanam right was acquired by the 1st defendant with the funds supplied by her husband. There was nothing in the deed itself to show that she was a person other than an ordinary assignee of a mortgagee's right.

Held, that the mere fact that her husband found the money, for the assignment or transfer of the mortgagee's right was not by itself sufficient to throw the onus on the 1st defendant to show that the property was her absolute property and did not belong to the tarwad."

The learned Judge dealt with the earlier decisions at length and pointed out that where the gift was in favour of the mother and children, there was a presumption that it was a tavazhi gift. It would be seen that in the case before Devadoss, J., there was no expression that the wife was to take the property absolutely.

Mr. Muthukrishna Ayyar for the appellant sought to distinguish *Narasamma Hegadathi* v. *Billa Kesu Pujari*[1] on the ground that in that case the learned Judges found words in the document showing that the wife was to take the property absolutely and that therefore the decision turned on the wording of the document.

1. (1919) 25 M.L.J. 697.
2. (1893) 2 M.L.J. 226: I.L.R. 16 Mad. 201 (F.B.).
3. (1915) 31 I.C. 854.
4. (1915) 29 M.L.J. 481: I.L.R. 39 Mad. 317 (F.B.).
5. (1927) 52 M.L.J. 17.

In the case before Devadoss, J., there was no gift to the wife but there was a purchase in the wife's name with the funds supplied by the husband and obviously there could not be an expression either way indicating whether the husband intended that the wife should get it absolutely or otherwise. That necessitated a decision on the question of the proper presumption to be drawn in a case where a gift was to the wife alone without any words as to the intention either way. Devadoss, J., said this :

"In *Pattatherwath Pathumma* v. *Mannan Kunnivil Abdulla Haji*[1], there was a finding by the District Judge who decided that case that though the property was purchased in the name of the mother it was intended for her children as well. In *Naku Amma* v. *Raghava Menon*[2] on the evidence it was found that the gift was for the benefit of the mother and her children. ...... In *Kuyyattil Kundan Kutti* v. *Vayalpath Parkum*[3], Kumaraswami Sastri, J., observed at page 109 :

"It may now be taken as settled law that where a person following the Marumakkathayam law gives properties to his wife and children or to his children alone also following the same law, the presumption is that he intended the donees to take the properties with all the incidents of tarwad property."

This passage is relied upon for the position that when property is acquired by the father in the name of the mother alone there is a presumption that the father intended that the property should be for the benefit of the mother and children. These cases do not support the contention of Mr. Ramachandra Aiyar. Each case has to be considered in the light of the circumstances attendant upon the transaction. Where the gift is made to the mother and the children, there is no question as to the intention of the donor ; where the gift is to the children, there also there cannot be much doubt. But where a man gives some property to or buys some property in the name of his wife, there is no presumption that he intends that she should not have absolute interest in the property but that she should hold it for the benefit of herself and her children. . . . The mere fact that her husband found the money for the assignment or transfer of the mortgagee's right is not by itself sufficient to throw the onus upon the 1st defendant to show that the property is her absolute property and does not belong to the tarwad. . . . . . . I do not think that there is any authority to support the position taken up by Mr. Ramachandra Aiyar that where a person makes a gift to, or buys property in the name of his wife, when there are children by the wife, there is a presumption that the property given to her or acquired in her name should be for the benefit of herself and her children."

It was recognised by Mr. Muthukrishna Ayyar that the decision of Devadoss, J., is very much against him and he therefore argued that the decision was that of a single Judge and ought not to be followed in view of the other decisions on the point. Then we found that the decision was taken up on letters patent appeal and that it was confirmed by Reilly and Anantakrishna Ayyar, JJ., in L. P. A. No. 376 of 1926. The learned Judges said this :

"We cannot differ from the learned Judge's decision in this case unless we are prepared to say —as we are invited for the appellant to say— that, whenever a gift of immovable property is made to a marumakkattayi woman, or immovable property is bought in her name by her husband and no explicit words are used to show that she is to have an absolute title to the property, a presumption must be raised that the property is to be that of the tavazhi consisting of her and her children. We are not prepared to say that there is necessarily such a presumption, and no decision goes so far, *Kuyyattil Kundan Kutty* v. *Vayalpath Parkum*[3] on which Mr. Unnikanda Menon relies, is not a similar case as there the gift was to all the children of a particular woman."

The decision of Kumaraswami Sastri, J., is explained as one being a case of a gift to all the children of a particular woman. All the children of a particular woman would, in case she is dead, be all the members of a tavazhi and if the gift was to all the members of a tavazhi then there might be a presumption that it is to be held as tavazhi property. That was how the decision of Kumaraswami Sastri, J., is understood by Reilly and Ananthakrishna Ayyar, JJ. We think that this is the correct view to take. These are all the decisions that have been brought to our notice and we cannot say on these decisions that where a property is gifted to the wife alone or to some of the children alone, there is the presumption that the donee takes it with the incidents of tarwad property. The presumption will arise only if the gift was in favour of the wife and children or in favour of all the children who by themselves form a tavazhi.

Taking the case of the acquisition by the wife (the 7th defendant), the property or Kanam-right was acquired in her name and we shall take it that the funds were

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1. (1908) 18 M.L.J. 16 : I.L.R. 31 Mad. 228.
2. (1915) I.L.R. 38 Mad. 79.
3. (1916) 32 I.C. 107.

supplied by the husband. Ex. D-11 is the document under which item 12 was acquired in the name of the wife. That is an assignment of a Kanam right by a third party. The case of this acquisition is covered directly by the decision in *Kaliani Amma* v. *Karthiyani Amma*[1], confirmed on appeal in L. P. A. No. 376 of 1926, where also it was the case of a kanam right acquired by the wife with the funds supplied by the husband. As stated by Devadoss, J., in that case :

"There is nothing in the deed itself to show that she was a person other than an ordinary assignee of a mortgagee's right. The mere fact that her husband found the money for the assignment or transfer of the mortgagee's right is not by itself sufficient to throw the onus upon the first defendant to show that the property is her absolute property and does not belong to the tarwad. It is for persons who want to make out something different from what appears from the documents to show that the intention of the first defendant's husband was to benefit not only the first defendant but her children as well."

Then as regards the acquisitions in the name of one or more children, *i.e.*, first, second, third or first and second together, if all that can be said is that the funds were supplied by the father, seeing that not one of them is an acquisition in the names of all the children who constituted the tarwad, the conclusion must be that there is no presumption that it is an acquisition on behalf of the tarwad.

Before we leave this topic it must be noticed that the rule of construction based on *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[2] and *Mahomed Shumsool* v. *Shewakram*[3] has largely been departed from in construing gifts and wills made by Hindus. Whatever may have been the notions and ideas of Hindus in the early days of the last century, women are no longer considered to be incapable of holding properties of their own. The central idea underlying the two decisions that a testator would like to have property within the family and would not like it to go out of the family as would be the case if the woman donee or woman legatee gets an absolute estate has been gradually given up. Many inroads have been made into the joint family system as understood in the early decades of the last century. Any individual member can, by his mere declaration of intention become divided from the rest of the family. Gains of science are now declared by statute to be the separate property of the acquirer. Women have gained prominence and are no longer dependent on "the father in youth, on the husband during coverture and on the children in old age." This topic has been considered in Mayne's Hindu Law (10th edition) at pages 908 and 909. As pointed out by the learned author in section 775, section 95 of the Hindu Wills Act which governs the wills of all Hindus lays down a rule of construction as to a gift simpliciter which is uniformly applicable to all cases whether the gift is to a female or a male. Where property is bequeathed to any person, he or she is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him or her. Rules of construction which are intended to aid Courts of law in ascertaining the wishes of the testator have to be adapted with changing times. If therefore the rules of construction laid down in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[2], and in *Mahomed Shumsool* v. *Shewakram*[3], are no longer applicable in cases governed by Hindu Law, it is a matter for consideration whether the decision in *Kunhacha Umma* v. *Kutti Mammi Hajee*[4], based as it is expressly on the rule of construction in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[2] and *Mahomed Shamsool* v. *Shewakram*[3] should be adhered to. At any rate, it should, we think, be confined to a case of gift to a wife and all her children where the wife is alive or if she is dead to all the children who form a tavazhi. Even in Malabar times have changed. Impartibility which is the fundamental characteristic of a Malabar tarwad has been put an end to by the Madras Marumakkattayam Act. Constant intercourse with the rest of India has brought about considerable changes in the ideas and notions of people on the West Coast. Conformably to the progressive ideas of that community the Legislature enacted the above Act. Wives are now given substantial rights in the husband's properties. We have no hesitation in saying that the whole question must be reviewed when the question directly arises for decision and is not covered

1. (1927) 52 M.L.J. 17.
2. (1857) 6 M.I.A. 526.
3. (1874) L.R. 2 I.A. 7.
4. (1919) 20 M.L.J. 86 : I.L.R. 33 Mad. 250.

by section 48 of the Marumakkattayam Act. A reasonable solution is to hold that except in cases governed by section 48 of the Act, there is no presumption that the donees do not get absolute rights. We have next to consider the argument that as the first defendant was the karnavan of the tavazhi, the acquisitions made by him must be presumed to be the tavazhi property, that the acquisitions in the names of the junior members during the period of his karnavanship must also be taken to have been acquired for the benefit of the tavazhi and that it lies upon the individual members who allege self acquisition to prove the same. In *Govinda Panikkar* v. *Nani*[1], Benson and Sundara Ayyar, JJ., laid down that there is no presumption of law that properties acquired in the name of a junior member of a tarwad belong to him or to the tarwad and that any presumption to be raised is one of fact. After referring to the earlier decisions the learned Judges said this :

"We do not, however, understand these cases as laying down that there is any presumption of law either way. The presumption is one of fact, see Mayne's Hindu law, paragraphs 289 to 291, and whether a presumption in favour of the property being tarwad property should be drawn or not in any particular case would depend on various circumstances such as the relationship of the member in whose name the title stands to the karnavan at the time of the acquisition of the property in question, the possession of private means by the junior member, the existence of any family funds at the time of the acquisition which disappeared after the acquisition, and any other fact that may throw light on the source of the money used for the acquisition. In this case the lower Court has found on a consideration of the evidence on record that the property in question belonged to the deceased Sankunni. On this view it is unnecessary to consider the second question argued by Mr. Rosario whether the finding against his clients that their title to particular items of property is *res judicata* is correct or not."

This decision was understood by the mofussil Courts as laying down that there is a presumption in favour of a junior member that a property acquired in his name is his separate property. This view was corrected by Wallis, C.J., and Burn, J., in *Dharnu Shetti* v. *Dejamma*[2], and the headnote runs thus :

"In deciding the question as to whether certain properties belong to a Malabar tarwad or to an individual member thereof, the facts and circumstances of the particular case have to be looked at and the presumption as to the nature of ownership has to be raised accordingly. There is no presumption that properties standing in the name of an Anandravan are tarwad properties. Nor is there a presumption in favour of the property being self-acquired so as to require proof of want of private means or existence of family funds to rebut the same."

Dealing with the earlier decision in *Govinda Panikkar* v. *Nani*[1], the learned Judges said :

"As we understand, the learned Judges in I.L.R. 36 Mad. merely lay down that the right way to approach the case is to look at all the facts and circumstances of the particular case and to raise a presumption accordingly."

In *Subramania Patter* v. *Krishna Embranderi*[3], decided by Sadasiva Ayyar and Spencer, JJ., Sadasiva Ayyar, J., was inclined to the view that in a Malabar tarwad the presumption should be in favour of an anandravan. On page 592, the learned Judge said :

"So far as the first question as to whether the finding of the lower appellate Court that the decree amount belongs to the tarwad is concerned I think it has to be admitted that the lower appellate Court was wrong in its view that there was presumption in favour of the tarwad that the bond standing in the name of a junior member belongs to the tarwad. The matter has been fully considered in *Govinda Panikkar* v. *Nani*,[1] and *Dharnu Shetti* v. *Dejamma*[2], and it has been held there is no presumption either way. If there is no presumption either way, the plaintiffs coming into Court are to prove the facts which show that a bond in the name of a junior member is tarwad property. I myself am inclined to hold whatever may be the presumption as regards the bond in the name of a junior member of a Mitakshara family (see as to this *Parbati Dari* v. *Baikuntanath De*[4], though even in Mitakshara cases the presumption in my opinion in the modern days is a very feeble one) that as regards the Malabar Tarwad the presumption should be against the tarwad."

In *Soopiadath Ahmad* v. *Manha Mammad Kunhi*[5], Phillips and Ramesam, JJ., laid down that while there is a presumption that a property acquired by a karnavan is the tarwad property, the same presumption does not ordinarily apply to property which stands in the name of an anandravan. Dealing with the earlier decisions, the learned Judges said this on page 577 :

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1. (1913) I.L.R. 36 Mad. 304.
2. (1916) 5 L.W. 259.
3. (1920) 39 M.L.J. 590.
4. (1914) 26 M.L.J. 248.
5. (1926) 23 L.W. 575.

"Coming in the merits of the case, it is argued that there is a very strong presumption that property standing in the name of a member of a Malabar Tarwad belonged to that tarwad. The presumption has been laid down in *Chathu Nambiar* v. *Sekharan Nambiar*[1] and *Mari Vattil Nair* v. *Mari Vattil Mulamparol Sekharan Nair*[2], with regard to karnavans, and undoubtedly, with regard to karnavans, the presumption is very strong, for they are in possession of the whole of the property of the tarwad and can deal with it as they like. A similar presumption is sought to be established with regard to the anandravans. Ordinarily an anandravan has no private property, but is only a member of the tarwad which owns properties, but when we find that there is property in the name of anandravan and it is not shown that he has been in possession of tarwad funds, the presumption in favour of the property being tarwad property is very slight, and it is open to the anandravan to show he had private money out of which he could acquire the property."

Sitting as single Judges, Sundaram Chetty, J., in *Iswaran Nambudiri* v. *Vishnu Nambudiri*[3], and Venkataramana Rao, J., in *Puthiamatathummal Peringadi Assankutti* v. *Peedikayilakath Mammad*,[4] held that the question is one of fact to be decided on the facts and circumstances of each case and that if there is nothing either way, the decision should be in favour of the tarwad. Our attention has been called to a recent decision of Chandrasekhara Aiyar, J., in Second Appeal No. 1965 of 1944 (not yet reported) where the learned Judge was inclined to take a similar view.

In the neighbouring State of Travancore, the law is that a property acquired by a junior is to be presumed to be his own separate acquisition and that it lies on the party setting up that it is tarwad property to prove that it was an acquisition on behalf of the tarwad—*See* Sundara Aiyar's Malabar Law pages 182 and 183 where the decision of the Travancore High Court are referred to.

The decisions of the Judicial Committee as to the presumption to be raised in the case of a joint Hindu family should not, we think, be applied to cases of acquisitions in the names of junior members of a Malabar Tarwad. It is notorious that in cases of Malabar Tarwads, the karnavan is very anxious to save as much as he can for the benefit of his wife and children who are not members of his tarwad. Indeed the complaint is that he does not even maintain the junior members properly. This is inherent in the system of Malabar Law where the karnavan's duty and interest are in conflict with each other—very much more so than in the case of a manager of a joint Hindu family whose sons are members of the coparcenery with equal rights and whose wife and daughters are entitled to maintenance from the joint family properties. We are inclined to agree with the view of Sadasiva Ayyar, J., in *Subramania Pattar* v. *Krishna Embranderi*[5] and that of the Travancore High Court. Judicial notice may be taken of the well known tendency of a karnavan and so viewed the presumption that applies in the case of a joint Hindu family ought not to be applied to cases of Malabar tarwads.

It is common case that in the present case, the first defendant became the Karnavan only after 1932 when his father died.

We shall now take up each item and examine the evidence regarding its acquisition. Item 5 was gifted to the first defendant under Ex. D-23, dated 13th March, 1925. The gift was by the father Kandar Mannadiar and it says this :

"Whereas the landed properties described in the sub-joined schedule, consist of my own private acquisition, the saswatham right to which I had got assigned in teer to me under the registered teer deed of 1070, M.E., (1894-95) and I have hereby decided to effect the assignment of the same to you in *Danam* teer (assignment by gift) setting a teer value of Rs. 600 therefor, and I am satisfied as to the receipt of the said assignment consideration from you in full in the shape of my love to you as my son, I have divested myself of all the claims belonging to me in the schedule properties and delivered the same into your possession this day, in gift. You should therefore hold that said properties in your possession in the exercise of full and free right of alienation of the same and I have no manner of further interest or right of question about it prejudicial to your doing so."

Item 6 is a kanam right of certain properties taken by one S. Rowthan. The first defendant obtained a transfer of the kanam or mortgage right under Ex. D-4, dated the 25th March, 1925, and the consideration was Rs. 300. As regards item 5,

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1. (1925) M.W.N. 61.
2. (1919) 20 M.L.J. 86: I.L.R. 33 Mad. 250.
3. (1931) 60 M.L.J. 467.
4. (1939) M.W.N. 4.
5. (1920) 39 M.L.J. 590.

the gift deed Ex. D-23, set out above was executed by Kandar Mannadiar at a time when both the first and second defendants were majors. All the daughters had also been born and a third son was also born though he was minor. The respondent's learned advocate argues that if really Kandar Mannadiar wanted to make a gift of the properties to the tavazhi of his wife and children he would have executed it in favour of his wife and children and named them as the donees or that at any rate there would have been a clear indication that it was to be taken by the donee on behalf of the entire tavazhi. The only argument for the appellants is that where a father purports to make a gift of the property to one of his children, the parties being governed by the Marumakkathayam law, there is a presumption that a gift in favour of the son or child is for the benefit of the entire tavazhi. Mr. Sitarama Rao for the respondents urges that the circumstances under which the document was executed and the wording of the document clearly show that the gift was intended only for the benefit of the first defendant. The consideration for the document is said to be the love which the donor bears to the donee as his son. The property is "given to you in *danam, i.e.*, gift." "You should therefore hold the said properties in your possession." At that time, there were the other major son, the daughters and the minor son. We have to take all these circumstances into consideration and having regard to the surrounding circumstances and the wording of the document, we are of opinion that even if there is a presumption in favour of the gift being one to the tavazhi, the said presumption has been effectively rebutted.

As regards item 6, it is an acquisition of a usufructuary mortgagee's right for a sum of Rs. 300. It was acquired in 1925, when the first defendant was not in fact managing the properties of the tavazhi. It is true that he was the eldest male member, but apparently as he was a young man, his father was in actual management of the properties. The first defendant cannot therefore be said to have been in possession of the family properties or the funds of the family in which case the Court could presume that the property was acquired by the first defendant from out of the funds of the tavazhi. The only argument put forward in support of the appellants' case is that the first defendant got a sum of Rs. 300 from his father Kandar Mannadiar and that therefore there is a presumption in favour of the acquisition being a tavazhi acquisition. As we have held already, there is no presumption when a property is acquired by a father in the name of one child, while there are several children, that the acquisition is on behalf of the entire tavazhi. There are no other circumstances to show that this item is acquired for the tavazhi, on the other hand, the circumstances pointed out in dealing with item 5 apply to this case also.

We next go to item 7 which was acquired by the third defendant on the 14th July, 1937, under Ex. D-18. That was a purchase of jenm right *i.e.*, full ownership. The third defendant's case is that he had Rs. 400 and that the rest was given by the mother and that is spoken to by D. W. 1. The appellants say that the mother had no property of her own and that what all she had had been given to her by the husband and that therefore this item must be taken to have been purchased with the funds supplied by the father. Assuming that the father made some gifts to the wife and the wife gave a portion of that amount to one of her sons to enable him to purchase some property in his name, we do not think that the tavazhi is entitled to the property. One other argument of the appellants as regards this item may be noticed and that is that the first defendant who was the manager of the tavazhi purchased this item from out of the family funds by secreting it in the name of the third defendant and that it is a resut of collusion between the two in order to cheat the plaintiffs. We have been taken through the entire evidence and we find no basis for the suggestion that the first defendant really found the consideration for this document. It is not at all likely that a Karnavan would give a portion of the income to his brothers or other members of the family. There is no evidence on which we can say in this case that any moneys of the family were given to the third defendant and that with the moneys so got from the first defendant the property in question was acquired by the third defendant.

Items 9 and 10 were acquired in the name of the second defendant for a sum of Rs. 6,500. It is not clear when exactly the properties were purchased, but it is admitted that they were acquired after 1937 under a single transaction. The sale deed was not produced by the second defendant and the appellants did not produce even a registration copy. Thus the Court is left in the dark as to when exactly the property was acquired. But it is common case that it was acquired for Rs. 6,500 in the name of the second defendant. There is unimpeachable evidence that a sum of Rs. 4,000 was deposited in the name of the second defendant in 1931 with a bank and that that amount was withdrawn by the depositor soon afterwards. Ex. D-28 is an extract from the deposit ledger of the Melarkode Bank. That contains an account of the second defendant with the bank. It shows that on the 9th April, 1931, a sum of Rs. 4,000 was deposited and that it was withdrawn on 23rd July, of the same year. We have also Ex. D-20 and Ex. D-21 which show that in 1936 the second defendant borrowed a sum of Rs. 800 from the Melarkode Bank on the security of a deposit of the second defendant's moneys with the bank. These two documents prove that a sum of Rs. 4,000 was again deposited with that bank on the 25th March, 1935 and that the fixed deposit was to mature on the 25th March, 1937. Ex. D-20 runs thus :—

"I beg to hand you herewith my deposit Receipt No. 530, dated 25th March, 1935, for Rs. 4,000 due on 25th March, 1937 and request you to hold the same as a collateral security for the loan Rs. 800 received from you to-day. I hereby authorise you to set off at any time the whole or any porition of the said deposit towards the loan in case you deem it necessary."

Ex. D-21 is the promissory note for Rs. 800. These two documents would prove that Rs. 4,000 was again deposited under fixed deposit in 1935, and that as the depositor the second defendant was in need of Rs. 800 he borrowed that sum under Ex. D-21 on the security of the fixed deposit. There is also evidence that the second defendant was lending out some money in his own name. Ex. D-27 (*b*) is a promissory note in the name of the second defendant for Rs. 100 and is dated the 28th January, 1936. There is therefore proof that the second defendant was in possession of some property of his own. We have evidence that from 1931 to 1936 he had a sum of Rs. 4,000 . It is therefore very likely, as the lower Court has held, that this sum of Rs. 4,000 was utilised by the second defendant for the acquisition of these items.

We next go to items 8 and 13 which are claimed by defendants 1 and 2 as their joint acquisitions. They were both acquired under Ex. D-6 dated 25th December, 1929 and the consideration was Rs. 20,000. Ex. D-6 is a hypothecation of the kanom right in certain properties for Rs. 2,000 and is effected by the Kanamdars who are third parties. The question is whether the hypothecation right can be said to be an acquisition for the tavazhi . In this connection it is important to notice that at that time the father Kandar Mannadiar was actually managing the properties owned by the tavazhi. Neither the first defendant nor the second defendant was in possession of any of those properties and it cannot therefore be said that the first and second defendants used the moneys of the family for this acquisition.

The next argument is that the father must have supplied funds for the acquisition and this leaves us with the general question whether under the Marumakkattayam law, the presumption is that property acquired by some of the children with the moneys supplied by the father is tavazhi property. The hypothecation under Ex. D-6 was a kanam right. The equity of redemption in the kanam was purchased by defendants 1 and 2 under Ex. D-7 dated 23rd April, 1933, for a sum of Rs. 4,550 of which Rs. 2,846 was due under Ex. D-6. The balance of Rs. 1,704 was paid by defendants 1 and 2, Rs.15 was paid to the vendors and Rs.1,689 was paid to some of the creditors. The kanam right became vested by the combined operation of Exs. D-6 and D-7 in defendants 1 and 2. They got a renewal of the kanam under Ex. D-8, dated 5th December, 1940 from the jenmi K. C. Manivikrama Raja, the Zamorin.

It is only as regards the acquisition of the equity of redemption which was acquired for Rs. 1,704 that any question can arise. By that time (28th April,

1933) the father was dead and the first defendant had entered into actual managment. But we have these facts. The original hypothecatee's right must be taken to be the self-acquired property of defendants 1 and 2. First defendant had entered upon the managment only a year before the equity right was purchased and could not have saved much in a year from the tarwad properties. First defendant had independent means; he had items 5 and 6. Having regard to all these facts, we find that the acquisition of the equity was also the self-acquired property of defendants 1 and 2, particularly as it is an enlargement of the prior right which was their self-acquisition.

Only one other point remains. It is said that in a prior suit O.S. No. 25 of 1927, Sub-Court, Ottapalam, the defendants admitted that items, 3 6 and 12 were the properties of all the defendants. That was a suit filed by the members of the Kandar Mannadiar's tarwad. Their claim was that items 3, 6 and 12 in the present suit were purchased by Kandar Mannadiar in the name of his wife or children from out of their tarwad funds and that the properties belonged to their tarwad. This was denied in a joint written statement filed by the wife and the children. There was no need to state which item belonged to which defendant. No doubt the statement was that the properties belonged to the de-defendants which means all the defendants. But having regard to the circumstances under which the statement was made, we do not attach much value to it.

We next go to item 12 which is in the name of the mother, the seventh defendant. The property is a kanam for Rs. 1250 under Ex. D-11 on 11th September, 1920 and the only argument is that the husband acquired the kanam right in the name of the wife and that therefore the presumption is that it is a tavazhi transaction. We have already held against this contention.

We are not inclined to interfere with the rate of maintenance awarded by the lower Court. The result is that the appeal and the memorandum of cross-objections are both dismissed with costs.

A. S. No. 441 of 1944: Following the decision in A.S. No. 440 of 1944 we dismiss this appeal and the cross-objections with costs.

K.S. ——— *Appeals dsimissed.*

THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Sree Meenakshi Mills, Limited .. *Appellant**

v.

The Provincial Textile Commissioner, Madras. .. *Respondent.*

Specific Relief Act (*I of* 1877), *section* 45—*Cotton Cloth and Yarn Control Order*, 1945—*Order issued by Textile Commissioner directing delivery of yarn to persons of particular categories—Respondent company contravening order by delivery of yarn to outside weavers—No contract of sale—Seizure of goods by Textile Commissioner for contravention—Application under section* 45, *Specific Relief Act—Does not lie.*

The Textile Commissioner of Madras issued an order under clause 18 B (1) (*b*) of the Cotton Cloth and Yarn Control Order, 1945, directing the appellant company to confine its delivery of yarn to three specified categories of persons with a view to securing a proper distribution of cloth or yarn. But the appellant company delivered yarn to weavers outside the mill premises on certain conditions, though the yarn delivered was not sold to them. The Textile Commissioner considered this course to be an infringment of his order and seized certain quantities delivered by the appellant to outside weavers. The appellant thereupon filed a petition under section 45 of Specific Relief Act.

Held, that the respondent had not travelled beyond his authority under clause 18 B (1) (*b*). He gave appellant the right to supply yarn to persons of specified category; but these categories did not include outside handloom weavers. In spite of the fact that the contracts entered into with them by the appellant company were not for the sale of yarn but only delivery of yarn under certain arrangements made with them, still there having been delivery and as the delivery had been in contravention of the order issued by the Textile Commissioner, the action of seizure of goods by the respondent was right. In fact the appellant was guilty of an offence which justified the respondent in seizing the yarn delivered in contravention of his order. The application under section 45 of the Specific Relief Act did not lie.

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* O.S. Appeal No. 12 of 1946. 23rd April, 1946.

On appeal from the judgment and order of the Hon'ble Mr. Justice Kunhi Raman dated 29th March, 1946, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 579 of 1946.

K. Subramanyam and *Alladi Kuppuswami* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) instructed by the Crown Solicitor (*H.M. Small*) for Respondent.

The Judgment of the Court was delivered by

The Chief Justice:—The appellant applied on the Original Side of this Court for an order under section 45 of the Specific Relief Act against the Provincial Textile Commissioner, Madras. The application was dismissed. Hence the appeal.

The appellant is a limited liability company which carries on a cotton spinning business in Madura. Under its memorandum of association it has also power to carry on business in weaving, but it has done no weaving itself, although in recent times it has had under contract some of its own yarn woven into cloth on handlooms within its own premises and on privately owned handlooms in the Madura, Ramnad and Tinnevelly districts. On the 20th February, 1946, the respondent issued an order under clause 18-B (1) (*b*) of the Cotton Cloth and Yarn Control Order, 1945, directing the appellant to confine its delivery of yarn to three categories of persons, namely: (1) Licensed yarn dealers, (2) consumers who had purchased yarn directly from the appellant during the basic period, 1940-42, and (3) persons working handlooms erected in the appellant's spinning mill at Madura. The handlooms in the mill admittedly belong to the appellant, but they are worked by persons who are paid at piece rates for weaving yarn supplied by the appellant. In spite of the fact that this order in effect prohibited the appellant delivering yarn to owners of handlooms situate outside the mill premises, the appellant continued to deliver yarn to such weavers. The yarn so delivered was not sold to the weavers. It was delivered to them on the condition that the cloth woven from it remained the property of the appellant, the weavers being remunerated for their labour at specified rates. The respondent considered this course to be an infringement of his order of the 20th February, 1946, and seized certain quantities of yarn which the appellant had delivered to outside weavers. This led to the appellant filing the petition for an order against the respondent under section 45 of the Specific Relief Act. The appellant contended that the respondent had no power to prohibit it from delivering yarn to outside weavers on terms of bailment and therefore his order was illegal. The application was heard by Kunhi Raman, J., who rejected it. We agree with the decision of the learned Judge.

It is only necessary for us to consider two clauses of the Cotton Cloth and Yarn Control Order, 1945. The clauses are 18-A and 18-B. They read as follows:

"18-A (1). No manufacturer shall, save in accordance with a general or special permission of the Textile Commissioner or in compliance with a direction given under clause 18-B (*a*) sell or agree to sell cloth or yarn to any person who—

(*i*) is not a licensed dealer under the rules framed in this behalf by the Provincial Government and

(*ii*) did not as a dealer buy any cloth or yarn from him at any time during the years 1940, 1941 and 1942;

(*b*) during any quarter deliver to any dealer, whether in pursuance of a pre-existing contract or otherwise, cloth or yarn in excess of his quota determined under sub-clause (2).

(2) For purposes of sub-clause (1) (*b*), a dealer's quota of cloth shall bear to the value of the total deliveries of cloth made to all dealers during the quarter by the manufacturer concerned the same proportion as the value of the total deliveries of cloth made to that dealer during the years 1940, 1941 and 1942 bore to the value of the total deliveries made to all dealers during the same years by the same manufacturer, and a dealer's quota of yarn shall be similarly determined.

(3) Every manufacturer shall maintain a register of contracts and deliveries and shall submit returns in such form and at such time as the Textile Commissioner may prescribe.

18-B (1). The Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a a view to securing compliance with this order, direct any manufacturer or dealer, or any class of manufacurers or dealers—

(2) to sell to such person or persons such quantities of cloth, or yarn as the Textile Commissioner may specify;

(b) not to sell or deliver cloth or yarn of a specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify;

(c) to furnish such returns or other information relating to his or their undertaking, and in such manner, as the Textile Commissioner may specify; and may issue such further instruction as he thinks fit regarding the manner in which the direction is to be carried out;

(2) Every manufacturer or dealer shall comply with the directions and instructions given under sub-clause (1)".

For the appellant it is said that clauses 18-A and 18-B must be read together and that as clause 18-A only refers to contracts for sale of cloth or yarn, clause 18 B (1) (b) must also be deemed to relate only to contracts for sale. As the contracts entered into with the owners of looms outside the mill were not contracts for the sale of yarn, but merely contracts of bailment, there could be, it is contended no infringement of the law. We are unable to accept this argument. Clause 18-B stands quite apart from clause 18-A. Its provisions are self-contained and there is no ambiguity in the wording. What clause 18-B (1) (b) says is that the Textile Commissioner may with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with the order, direct a manufacturer or dealer not to sell or deliver cloth or yarn of a specified description except to such person or persons and subject to such conditions as he may specify.

The respondent has not travelled beyond this authority. He has given the appellant the right to supply yarn to persons of specified categories; but these categories do not include outside handloom owners. It is true that the contracts which the appellant entered into with these persons were not contracts for the sale of yarn, but under the arrangements made with them the appellant "delivered" yarn to them. There being delivery of yarn and as the delivery was in contravention of the order of the 20th February, 1946, the respondent had the right to take action. In fact the appellant was guilty of an offence which justified the respondent in seizing the yarn delivered in contravention of his order.

There were further arguments raised before Kunhi Raman, J., but it is not necessary for us to discuss them. We have said sufficient to show that an application under section 45 of the Specific Relief Act did not lie.

The appeal is dismissed with costs which we fix at Rs. 500.

K.C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE SHAHABUDDIN.

Kumaraswamiah .. *Appellant**

v.

A. Krishna Reddi .. *Respondent.*

Civil Procedure Code (V of 1908), Order 7, rule 12—Failure to pay deficit court-fee within time allowed—Plaint not automatically rejected—Setting aside order rejecting application for extension of time for paying Court-fee—Consequential order rejecting plaint is automatically set aside.—Separate appeal—If essential.

The respondent filed a suit on the last day of limitation with a nominal court-fee, with an application for time to pay additional court-fee which was granted. On the day before the extended period elapsed the respondent filed another application for further time which was dismissed on the following day, the 25th January, 1945. The plaint however, remained on file until the 30th January, 1945, when the judge passed an order: "*application for extension of time was rejected on 25th January, 1945. Hence plaint is deemed rejected as on 25th January,* 1945." Before this order was passed two applications, one for reviewing the order of 25th January, 1945 and the other, to extend time were filed. The judge considered that there was sufficient cause for review and passed an order enlarging the time for payment of court-fee. On appeal,

Held: Order 7, rule 12, Civil Procedure Code, requires the Court to pass an order when it rejects the plaint giving reasons for doing so. That order was not passed until the 30th January, 1945, so that when money was tendered and application made on the 29th, the plaint was still in Court with regard to which an application for extension of time could be made. The plaint did not become automatically rejected on 25th January, 1945 on the failure to pay the Court-fee within time.

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*A.A.O. No. 590 of 1945 and C.R.P. No. 1256 of 1945. — 26th March, 1946.

Since an order had been passed on the review application setting aside the order of 25th January 1945 rejecting the application to extend the time, it would follow that the consequential order of 30th January 1945, rejecting the plaint would be automatically set aside and it is not incumbent on the plaintiff to file an appeal against the order rejecting his plaint.

Appeal against the order of the Court of the Subordinate Judge of Chittoor dated 23rd June, 1945 and made in I.A. No. 52 of 1945 (unregistered plaint R. No. 106 of 1945).

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

T. K. Srinivasa Thathachariar for Respondent.

The Judgment of the Court was delivered by

Horwill, J:—The respondent filed a suit on a promissory note on the last day of limitation (11—1—1945) with a nominal court-fee, and with his plaint filed an application for fourteen days' time to pay the additional court-fee. That application was granted. On 24th January, 1945, the day before that extended period elapsed, the respondent filed I.A. No. 41 of 1945 asking for a further ten days' time. That application was rejected on 25th January, 1945, the following day. The plaint however remained on file until 30th January, 1945, when the learned Subordinate Judge passed the order :

"Time extended till 25th January, 1945 as per order on I.A. No. 13 of 1945 dated 11th January, 1945, for payment of deficit court-fee. On 24th January, 1945, the plaint was represented with a court-fee of Rs. 50 and a petition was also filed for further time of ten days. The petition was numbered as I.A. No. 41 of 1945. Court-fee was not paid. I.A. No. 41 of 1945 for extension of time was rejected on 25th January, 1945. Hence plaint is deemed rejected as on 25th January, 1945."

Before this order had been passed, on the 29th January, the respondent filed the two applications with which we are now concerned ; one was for a review of the order refusing to extend the time and the other was a petition to extend the time. The facts alleged in those petitions were not controverted in the counter. They are to the effect that in order to comply with the orders of Court to pay the deficit court-fee by 25th January, 1945, he had sent his sons to raise the money. They had in fact obtained the money ; but one of them became seriously ill with typhoid and on 25th January, 1945, the date on which the money should have been deposited in Court, the son died. Because of the seriousness of his illness, the other brother took his sick brother home on the previous day instead of taking money to the Court to pay to his vakil, with the result that instead of depositing the money into Court, which he could have done within the time allowed, he took it home. The learned Judge—very rightly in our opinion—considered this a sufficient cause for review and then passed the order appealed against, enlarging the time and directing the plaintiff to pay court-fee by the 26th June, 1945.

An argument has been based on the circumstance that since the application to extend the time was taken on 25th January, 1945, there was no plaint with regard to which an application for extension of time could be made on 29th January, 1945. This is clearly wrong ; because Order 7, rule 12, Civil Procedure Code requires the Court to pass an order when it rejects the plaint, giving reasons for doing so. That order was not passed until the 30th ; so that when the money was tendered and the application made on the 29th, the plaint was still in Court. The learned Subordinate Judge was wrong in his order of the 30th January, in thinking that the plaint became automatically rejected upon failure to pay the court-fee within the time allowed.

It was then argued that the review petition ought not to have been granted ; because before the order on I.A. No. 41 of 1945 had been passed, the plaint had already been rejected ; and that it would be therefore to no purpose to review the order in I.A. No. 41 of 1945. It is further argued that it was incumbent on the respondent to file an appeal against the order rejecting the plaint. Since an order had been passed on the review application setting aside the order rejecting the application to extend the time, it would follow that the consequential order passed on 30th January, 1945, rejecting the plaint would be automatically set aside

upon the setting aside of the order of 25th January, 1945. No authority has been cited to us which suggests that when setting aside an earlier order, it is also necessary to set aside the consequential order. Moreover, if there were any substance in this technical objection by the appellant, it would suffice to point out that the respondent might well argue that there was no order passed rejecting the plaint; for, as we have already said, the learned judge seemed to think that the rejection of the plaint automatically followed upon the failure to pay court-fee within the time allowed; and the order passed by him on 30th January, did not say that he thereby rejected the plaint. He said that the plaint was to be deemed rejected as on 25th January, 1945. In other words, he considered that the rejection of the plaint had already occurred and needed no further order on his part.

The appeal is dismissed with costs.

The civil revision petition is also dismissed, but without costs.

V.P.S. ——— *Appeal and petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUPPUSWAMI AIYAR.

Suravarapu Sarraju .. *Appellant**

v.

Nidadavolu Venkatraju and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 34, rule 5—Applicability—Not applicable to a decree for maintenance which in its terms is final and executable.

A decree passed in a maintenance suit is a final decree which entitles the decree-holder to proceed directly in execution should the judgment-debtor fail to pay the amount due by him. Order 34, rule 5 of the Code of Civil Procedure cannot have any application to such a decree.

Appeal under clause 15 of the Letters Patent against the order of Bell, J., dated 26th November, 1945, in A. A. A. O. No. 371 of 1944, preferred to the High Court against the decree of the Court of the Subordinate Judge of Coconada in A. S. No. 64 of 1944 (E. A. No. 1372 of 1943 in O. S. No. 250 of 1933, District Munsiff's Court, Coconada).

K. Bhimasankaram for Appellant.

D. Narasaraju for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—On the 9th October, 1933, the second respondent obtained a decree for maintenance against the father of the appellant, the amount of maintenance being charged upon property owned by him. The payment was not made as directed and consequently the second respondent was forced to take proceedings in execution against the appellant. On the 13th August, 1943, the appellant's property was sold to the first respondent in accordance with the order of the Court. The appellant filed an application under Order 21, rule 90, Civil Procedure Code, but it became infructuous as he failed to make the required deposit. On the 13th October, 1943, he deposited the amount for which the property was sold together with five per cent. on that amount. This he purported to do under Order XXXIV, rule 5 (1), treating the maintenance decree as being a preliminary decree passed in a mortgage suit. The District Munsiff held that Order XXXIV, rule 5 did not apply and dismissed the appellant's application. On appeal the Subordinate Judge held that Order XXXIV, rule 5 did apply. The auction purchaser then appealed to this Court. His appeal was heard by Bell, J., who agreed with the District Munsiff, but gave leave for filing the present appeal under clause 15 of the Letters Patent.

We consider that the judgment under appeal is right. A decree passed in a suit for maintenance is a final decree which entitles the decree-holder to proceed

*L.P.A. No. 17 of 1946. 22nd July, 1946.

directly in execution should the judgment-debtor fail to pay the amount due by him. Sub-rule (1) of Order XXXIV, rule 5 allows a payment into Court to be operative only when it is made on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3). Sub-rule (3) says that where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf and after notice to all the parties, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4. Rule 5 cannot have any application to a decree passed in a maintenance suit which in its terms is final.

The appeal is dismissed with costs in favour of the first respondent.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUPPUSWAMI AYYAR.

Godavarthi Venkanna .. *Appellant**

v.

Godavarthi Venkatanarayana .. *Respondent.*

Hindu Law—Joint family—Re-union—If all parties should have property to bring back to the joint family—Property settled by father on son—If ancestral.

The fact that a re-uniting member had dissipated the whole of his share of the family estate did not prevent an agreement between him and his father to re-unite and the father treating his property as joint family property.

In any event after the death of the father properties settled on the son (to be taken absolutely on the father's death) will be ancestral property in which the son's son will have a right to claim partition.

Appeal under clause 15 of the Letters Patent against the judgment of Chandrasekhara Aiyar, J., dated 12th December, 1945, in S. A. No. 1620 of 1944, preferred to the High Court against the decree of the District Court, West Godavari, at Ellore, in A. S. No. 352 of 1943, preferred against the decree of the Court of the Subordinate Judge, Narsapur, in O.S. No. 32 of 1940.

P. Satyanarayana Rao and *B. V. Subrahmanyam* for Appellant.

V. Parthasarathi for Respondent.

The Judgment of the Court was delivered by

The Chief Justice :—The appellant is the defendant in the action which has given rise to this second appeal. He has contested the plaintiff's claim in the three Courts below and in this Court with a persistency and vigour worthy of a better cause, but in this Court he has accepted some of the findings below, as contest was no longer possible.

The plaintiff is the defendant's adopted son. He sued in the Court of the Subordinate Judge of Narsapur for a decree for partition of the family estate. The defendant denied that he had ever adopted the plaintiff and pleaded that the property which the plaintiff claimed to be joint family property belonged to him in his own right. The Subordinate Judge held that the plaintiff had been adopted by the defendant and that the properties were joint family properties. The plaintiff averred in his plaint that there had been a partition between the defendant and his father but that subsequently there had been a re-union. The defendant said that this plea of re-union was not raised in the plaint and that this question should not be gone into. The Subordinate Judge held in favour of the plaintiff on all the issues raised by the defendant. On appeal the District Judge of West Godavari agreed with the findings of the Subordinate Judge and they were concurred in

* L. P. A. No. 9 of 1946. 16th July, 1946.

by Chandrasekhara Aiyar, J., who heard the second appeal. This appeal is from the judgment of the learned Judge.

In this Court, the finding that the plaintiff is the adopted son of the defendant has been accepted and it has also been accepted that the plaint was sufficiently widely drawn to raise the issue with regard to the factum of re-union. Two questions have however been strenuously argued here, namely (1) whether the re-union was lawful and (2) whether the properties settled by the defendant's father upon the defendant under a deed dated the 28th April, 1933, could be regarded as ancestral properties in the hands of the defendant. The Subordinate Judge held that if there had not been a reunion, the properties were ancestral and therefore the plaintiff was entitled to a share. The District Judge did not discuss this matter but the Subordinate Judge did and Chandrasekhara Aiyar, J., agreed with him.

The partition between the defendant and his father took place on the 6th April, 1914. Under the terms of the division the father received as his share all the properties described in schedules A and B to the plaint, except item 1 in Schedule A and the third item in Schedule B. The defendant was apparently of wayward habits and dissipated all his properties, except one which he sold to his father on the 24th November, 1918. On the 28th May, 1917, the father executed a will under which he left the whole of his property to the defendant's wife, but by a will dated the 31st January, 1922, he left his properties to his son and daughter-in-law jointly. The date of the re-union has not been found, but it took place sometime between 1922 and 1929. On the 28th April, 1933, the testator revoked his second will and settled the properties which he had received at the partition with his own father and the property which he had bought from his son on the 24th November, 1918, on his son during his (the settlor's) lifetime. It was distinctly provided that the son should have no right of alienation and that he should maintain his father to his father's satisfaction. In the event of his not fulfilling these conditions the father was to have the right of revoking the settlement. On the settlor's death the son was to take the properties absolutely. We are not concerned with what bearing this document has upon the plea of re-union because the factum of re-union has now been accepted, but the validity of the re-union is challenged on the ground that the defendant had no properties to bring back to the joint family and the possession of some of the family properties by the defendant was, it is said, a condition precedent to a lawful re-union with his father. This contention is based on the following statement in the Mitakshara :

"Effects which had been divided and which are again mixed together are termed re-united. He to whom such appertain is a re-united parcener." (Chapter II, Sec. 9, placitum 2.)

It is contended that these words must be construed strictly and that there cannot be a mixing together of effects unless both parties to an agreement to re-unite possess some property which belonged to the family before partition.

In this connection stress has been laid upon the statement in the judgment of the Privy Council in *Ram Narain Chowdhury* v. *Mt. Pan Kuer*[1], where their Lordships said that where the text of the Mitakshara is clear and unambiguous recourse to other authorities is excluded. This certainly does not mean that the placitum which we have just quoted must be read as requiring the present possession of family property by all parties to an agreement to re-unite. Their Lordships were concerned with a very definite statement in the Mitakshara that there could only be a re-union between persons of a particular relationship, namely, father, brother and paternal uncle. The commentator would naturally not have in mind a case where one of the coparceners after the partition had lost the whole of his share in the family estate as a result of riotous living.

To read the passage quoted in the way contended by Mr. Satyanarayana Rao on behalf of the appellant would mean ignoring settled principles of Hindu Law. The joint status does not depend on the possession of property. The joint family

1. (1934) 68 M.L.J. 139 : L.R. 62 I.A. 16 : I.L.R. 14 Pat. 268 (P.C.).

may have no property at all, but one member may be wealthy in his own right. If he is, it is open to him to allow his private property to be treated as family property and if he does so, it becomes family property. We are of opinion that the fact that the defendant had dissipated the whole of his share of the family estate did not prevent an agreement between him and his father to re-unite and the father treating his property as joint family property.

This disposes of the legal objection to the re-union, but we may mention that in the course of his argument, Mr. Satyanarayana Rao relied on the judgments in *Gopal Chunder Daghoria* v. *Kenaram Daghoria*[1] and *Rusi Mandli* v. *Sundar Mandli*[2]. In neither of these cases was this question raised. In fact there is no reported case in which it has been raised. All that the reported cases have decided is that joint living and joint management of property in themselves are not proof of re-union. A re-union must be proved as the Privy Council observed in *Balabux* v. *Rukhmabai*[3] like any other fact. The re-union has been proved in this case and it has only been challenged on the technical plea which we have dealt with.

We agree with the Subordinate Judge and Chandrasekhara Ayyar, J., that even if there had been no re-union the plaintiff would have been entitled to a decree for partition of the properties mentioned in the plaint on the ground that on the death of his grandfather they became the ancestral property in the hands of his father. The estate granted to the defendant during the lifetime of his father was quite a different estate from that which he was to take on the death of his father. On the death of his father the properties were to become his absolutely. Having received them from his father they became ancestral in his hands.

The plaintiff is clearly entitled to a decree for partition and the defendant's appeal must be dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE SHAHABUDDIN.

Patan Alli Khan and others .. *Accused.**

Criminal Procedure Code (V of 1898), *section* 367—*Sessions case—Succeeding Judge—If can pronounce a judgment in case heard by his predecessor—Conviction—Legality—Defect—If cured by section* 537 *of the Code.*

Section 367, Criminal Procedure Code, does not authorise a succeeding Sessions Judge to pronounce a judgment of his predecessor who has heard the Sessions case. The moment the predecessor hands over charge to his successor he becomes *functus officio* and has no jurisdiction to write a judgment and the successor has no jurisdiction to pronounce a judgment based on evidence recorded by his predecessor. The "presiding officer" referred to in section 367 (1), Criminal Procedure Code, means the presiding officer at the trial, who is assumed in the section to have written and pronounced his judgment while still holding the same office. A conviction by the succeeding Sessions Judge is therefore illegal and must be set aside. The defect if it may be so called cannot be cured by section 537 of the Criminal Procedure Code.

Trial referred by the Court of Session of the Chittoor division for confirmation of the sentence of death passed upon the said prisoner (first accused) in C. C. No. 38 of 1945 on 15th January, 1946, and appeal by the said prisoners against the said sentence and case taken up by the High Court on perusal of the Calendar and judgment in Sessions Case No. 38 of 1945, Court of Session, Chittoor division.

V. Rajagopalachari, K. S. Jayarama Iyer, A. Bhujanga Rao, M. Sundaram and *S. A. Seshadri Ayyangar* for Accused.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Crown.

The Judgment of the Court was delivered by

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1. (1867) 7 W.R. 35.
2. (1910) I.L.R. 37 Cal. 703.
3. (1903) L.R. 30 I.A. 130 : I.L.R. 30 Cal. 725 (P.C.).

* R. T. No. 15 of 1946. (Crl. As. Nos. 158 and 123 of 1946). (Cr. R. C. No. 307 of 1946). (Taken up No. 1 of 1946). 18th April, 1946.

Horwill, J.—In the Court of the Sessions Judge of Chittoor there were four accused. The first was charged under section 302 of the Indian Penal Code with the murder of one Bandi Ramalingappa. The other three were charged under the same section read with section 109 of the Code with abetment of the murder. There was also a minor charge against the fourth accused of voluntarily causing hurt. The first accused was found guilty as charged and sentenced to death. The second accused was found guilty of abetment of murder and sentenced to transportation for life. The third and fourth accused were acquitted. The first and second accused have appealed.

It has been argued as a preliminary point that there was no legal conviction of the two appellants; because the judgment was written by a Judge having no jurisdiction to write the judgment and pronounced by a Judge who had not heard the evidence. The facts on which this argument is based are these: The evidence was recorded and arguments heard by Mr. Nainar. Thereafter, he handed over charge to Mr. Panchapakesa Aiyar, who had been appointed to relieve him at Chittoor. Mr. Nainar had been appointed to the Guntur Sessions division, but did not join immediately and was not in charge of it on any of the material dates. On the 12th January, 1946, the day after he had completed the hearing of the case, Mr. Nainar dictated the judgment to the shorthand writer in the Judge's bungalow. At that time, Mr. Panchapakesa Aiyar was the District Judge. Mr. Nainar probably received the typescript of the judgment on the 14th January, on which day he corrected it, signed it, and dated it, and handed it over to Mr. Panchapakesa Aiyar, who pronounced it in open Court on behalf of Mr. Nainar on the 15th of January. The question is whether the circumstances that at the time of writing this judgment and at the time of pronouncing it Mr. Nainar was not the Sessions Judge of Chittoor renders the judgment of no avail and makes the orders passed void.

The case of the appellants is a very simple one. They argue that Mr. Nainar became *functus officio* on the 11th of January, when he handed over charge to Mr. Panchapakesa Aiyar and that thereafter he had no jurisdiction to write a judgment and Mr. Panchapakesa Aiyar had no jurisdiction to pronounce it; the judgment which Mr. Nainar wrote and signed was not a judgment but merely a memorandum of his personal opinions which had no judicial effect. The learned Public Prosecutor, on the other hand, has pointed out the distinction drawn in the Code between a trial and a judgment and has sought to contrast the strict requirements with regard to a trial with the relative informality of the rules regarding the pronouncement of judgments. He concedes that it is a fundamental rule of criminal jurisprudence that the Judge who heard the evidence should write the judgment; but he argues that it is a matter of little consequence who actually pronounces the judgment in Court and that it was of no importance whether Mr. Nainar was actually in possession of the office of Sessions Judge, Chittoor, on the dates when he wrote the judgment and Mr. Panchapakesa Aiyar pronounced it. He has referred to certain decisions in civil matters in which it has been held that even though a Judge might be on leave or on vacation or in a new station he could write the judgment for his successor to pronounce. He argues that section 367, Criminal Procedure Code, does not enjoin the pronouncement of a judgment by the Judge who wrote it and that on a strict reading of section 367, Criminal Procedure Code, no irregularity, still less an illegality, was committed; and that if any irregularity or illegality was committed, it could be cured by section 537, Criminal Procedure Code.

In view of this divergence of interpretation of section 367, Criminal Procedure Code, it is necessary to enquire to what extent it was thought necessary before the Codes of Civil and Criminal Procedure took their present shape that the Judge who heard the evidence should write the judgment and pronounce it, and how far the procedure has since been modified. It seems to us that such provisions as Order 18, rule 15, Civil Procedure Code, which permits a succeeding Judge to use the evidence recorded by his predecessor and Order 20, rule 2 which authorises a Judge to

pronounce a judgment of his predecessor, suggest that without such rules it would be necessary for the same Judge to hear the cause from beginning to end and to pronounce the judgment. We are indebted to Mr. Jayarama Aiyar for drawing our attention to some of the older Codes and the decisions based upon them; so that we might see what Judges thought on these matters when the requirements of the Civil Law and the Criminal Law were the same. The rules enunciated under Order 18, rule 15 and Order 20, rule 2 were introduced into the Civil Procedure in the Code of 1877. In the earlier Code of 1859, we do not find any corresponding rules. Mr. Jayarama Aiyar has drawn our attention to Nelson's Commentaries on the Code of Criminal Procedure, a book written in 1873. Certain passages in the commentary on the then sections 463 and 464 proceed on the basis that the law relating to Criminal Procedure is the same as that relating to Civil Procedure; and we have verified the references made therein to the proceedings of this Court. In the proceedings of the Madras Sudder Court dated the 11th June, 1861, it was said:

"If after a Judge has left the Court, it be found that in any suit brought to a final hearing, no written judgment has been placed on record by him, his successor must hear and decide the suit, notwithstanding that such Judge may have pronounced judgment in the case, and made a brief note of his decision."

In the proceedings of the Madras Sudder Court of the 7th August, 1849, it was said:

"Judgments written by a Civil Judge but not pronounced in open Court, cannot, in the event of his removal before pronouncing the same, be published by his successor, but the cases must be re-investigated."

After reference to certain English cases, the learned Commentator added:

"When a Judge, after writing his judgment, but before delivering it in open Court dies, or leaves the bench, his written judgment is not to be considered as a judgment, but merely as an opinion."

In *Mahomed Akil* v. *Asadunnissa Bibee*[1], a Full Bench of learned Judges of the Calcutta High Court were considering the effect of a number of judgments written by members of the Bench and left in the office of the Registrar in accordance with the practice then prevailing; and the learned Judges who pronounced the judgments of the Court held that the so-called judgments left in the office of the Registrar were not judgments at all but merely memoranda of the opinions of the Judges who left them. It was pointed out that although these learned Judges had expressed their opinion with some finality in those judgments, it was not at all improbable that if they had had the benefit of reading the judgments of the other members of the Bench and had sat with them and pronounced their judgments with them, they might well have been led to decisions differing from those expressed in the judgments left in the office.

In *Naranbhai Vrijbhukandas* v. *Naroshankar Chandroshankar*[2], the learned Judges were considering an objection taken before them to the procedure adopted by a Munsiff in acting upon the evidence recorded by the Principal Sudder Ameer and were of opinion that the Munsiff had no jurisdiction to do so and had acted illegally. They pointed out that it was incumbent on every Judge to act upon the evidence of persons whom he had heard and seen for himself. One of the learned Judges, Tucker, J., put the matter in this way:

"It appears to me that one of the main underlying principles of the Code of Civil Procedure is that, at an original trial, the Judge who decides the cause shall have personally heard the evidence of the witnesses, on whose testimony his judgment is to be based, except in certain specified instances; and I cannot find that it is anywhere contemplated that a Judge of a Court of first instance should pronounce judgment on evidence taken before a predecessor in the same Court, or before a Judge of any co-ordinate tribunal, from which a part heard suit may have been removed.

I consider, therefore, that when a Judge of a Court of Original Jurisdiction, whose proceedings are regulated by the Code of Civil Procedure, dies, or is removed to another appointment, before the conclusion of a trial, or where a partially tried suit is removed from one Court to another, the evidence of the witnesses, who have been examined by the Court which commenced the inquiry must be taken *de novo*, unless the parties consent that the depositions already recorded shall be read at the hearing before the Judge or Court on whom it will devolve to pass judgment."

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1 (1867) 9 W.R. 1 (F.B.).

2. (1867) 4 Bom. H.C.R. 98 (A.C.J.).

The other Judges expressed similar opinions. If that is the law with regard to civil suits, then the procedure for the conducting of criminal trials cannot be less strict; for it is even more necessary in criminal cases that the Judge who writes and pronounces the judgment should have seen the witnesses and heard the evidence for himself.

No cases have been cited by the learned Public Prosecutor which suggest that prior to 1877 it was considered permissible in either civil or criminal cases for a Judge to pronounce a judgment he had not written or which was not based on evidence heard by him entirely. The importance of the Judges hearing the evidence of witnesses and observing their demeanour has been emphasised in many decisions and the possibility pointed out of the Judge's changing his opinion at any time before he actually signs the judgment pronounced by him.

It will be seen from the above analysis that the original law was that the Judge who writes and pronounces a judgment must be the Judge who hears all the evidence. This must still be deemed to be the law, except in so far as it has been modified by the Legislature from time to time. We have already referred to the provisions of Order 18, rule 15 and Order 20, rule 2 of the Civil Procedure Code which modified the law in civil cases. If there are no corresponding provisions in the Code of Criminal Procedure, we shall be compelled to conclude that the earlier rule prevails. In *Kunhammad Haji*, In re[1], this Court had to consider whether a Criminal Court had any powers of review similar to those possessed by Civil Courts by virtue of Order 47 of the Code of Civil Procedure. The learned Judges pointed out that the Criminal Procedure Code had been passed after the Civil Procedure Code and had been amended many times, and held that since no powers for review were expressly given in the Criminal Procedure Code, it must be presumed that no such power exists. In the same way, we must hold that unless the Code of Criminal Procedure expressly provides for the pronouncement of a judgment by a Judge other than he who recorded the evidence, a succeeding Judge would have no power to do so.

One modification of the original strict rule was introduced into section 350 of the present Code, which permits a succeeding Magistrate exercising jurisdiction to act upon the evidence recorded by his predecessor or partly recorded by him; but even that modification is hedged round by provisos which give an accused person a right to demand that the witnesses or any of them should be re-summoned and re-heard. There is admittedly no corresponding provision relating to sessions trials; but it is argued that section 367 of the Code also modifies the ancient rule and permits a judgment written by one Judge to be pronounced by his successor. Sub-section (1) of section 367 of the Code reads:

"Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court . . . . . in the language of the Court . . . . . and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open Court, at the time of pronouncing it."

If in each case where the term "presiding officer" is used, it refers to the "presiding officer" who happens to hold the office at the time when the relevant act is done, then section 367 would appear to justify the writing of the judgment by the officer who was presiding over the Court at the time when the judgment was written and the pronouncement of the judgment by the Judge who happened to be holding office at the time of the pronouncement. In other words, a Judge who had not heard any of the evidence or any of the arguments could write the judgment because he happened to be presiding over the Court at the time when the judgment was written. The learned Public Prosecutor agrees that this intrepretation cannot be put on section 367 of the Criminal Procedure Code, as it would lead to gross violation of the fundamental principle of criminal law that the Judge who hears the evidence should write the judgment. He therefore asks us to read section 367 of the Code as if the presiding officer first referred to was not the presiding officer at the time of writing the judgment, but the presiding officer at the time of the

1. (1922) 44 .L.M.J. 450 : I.L.R. 46 Mad. 382.

recording of the evidence and the hearing of the arguments and the second presiding officer the officer presiding at the time of the pronouncement of the judgment. That would necessitate the use of the words "presiding officer" in two different senses in the same sub-section—a violation of an accepted principle of interpretation of statutes. We are therefore driven to conclude that the presiding officer referred to in section 367 (1) of the Criminal Procedure Code in both cases means the presiding officer at the trial, who is assumed in the section to have written and pronounced his judgment while still holding the same office.

The learned Public Prosecutor has, however, a certain amount of authority in support of his argument. In *Sankara Pillai*, In re[1], the learned Judges had to consider whether a magistrate who delivered a judgment that his predecessor had intended to deliver and would doubtless have delivered if he had not been transferred, had jurisdiction to do so. The learned Judges disposed of the matter very briefly by referring to section 367 of the Code of Criminal Procedure and saying that there was nothing in that section which suggested that the Judge who pronounced the judgment had to be the same as the Judge who wrote it. They did not consider this section in conjunction with the rest of the Code, nor did they consider the principles underlying the procedure in criminal cases. Later, the matter came up before this Court again in a slightly different form in *Savarimuthu Pillai*, In re[2]. The facts there were similar to those in *Sankara Pillai*, In re[1], except that in the later case the succeeding magistrate declined to pronounce the judgment and decided to hear the evidence afresh. The question before the learned Judges was whether he had jurisdiction to do so. The case of *Sankara Pillai*, In re[1], was considered by the learned Judges, who seemed to think that the earlier decision could be justified only on the supposition that the succeeding magistrate adopted the judgment of his predecessor as his own. The learned Judge who delivered the leading judgment said :

> "Whatever action he takes must be under section 350 (1) which leaves it to his discretion. There is no specific provision in the Criminal Procedure Code corresponding to Order 20, rule 2 of the Civil Procedure Code, under which it might be argued that the second judge was merely the mouth-piece of the first. A Magistrate who pronounces a judgment of his predecessor must in my opinion be taken to adopt it as his own."

That would mean that the second magistrate could adopt the judgment as his own only if he were entitled—as perhaps a magistrate is entitled by virtue of section 350 (1), Criminal Procedure Code—to deliver a judgment based on evidence recorded by his predecessor. That cannot be done in a Sessions case, to which section 350 (1) would not apply. Moreover, it is clear in this case that Mr. Panchapakesa Aiyar did not adopt the judgment of Mr. Nainar as his own. He purported merely to be the mouth-piece of Mr. Nainar, as is indicated by the use of the following words at the end of the judgment : "Pronounced in open Court on behalf of Mr. Nainar". In *Jogesh Chandra Roy* v. *Surendra Mohan Roy Chowdhury*[3], the decision in *Sankara Pillai*, In re[1], was expressly dissented from, it being held that the Sessions Judge had no jurisdiction to pronounce the judgment of his predecessor. If the decision in *Sankara Pillai*, In re[1], purports to be an interpretation of section 367 of the Criminal Procedure Code without reference to the provisions of section 350, Criminal Procedure Code, which deals with cases before a Magistrate, then we would find it difficult, with respect, to accept that interpretation as correct. But it is unnecessary for the purpose of disposing of this appeal to expressly dissent from it, because it can be distinguished on two grounds : the first is that already indicated, *i.e.*, it dealt with a case where there was a change of magistrates, in which different considerations arose because of the provisions of section 350, Criminal Procedure Code; and the second is that in that case the earlier magistrate continued in office when he wrote the judgment ; whereas in this case when the judgment of Mr. Nainar was written he was no longer the Sessions Judge of Chittoor.

We may mention in passing an argument of the learned Public Prosecutor based on certain decisions of civil cases that although Mr. Nainar was no longer

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1. (1908) 18 M.L.J. 197.
2. (1916) 32 M.L.J. 81: I.L.R. 40 Mad. 108.
3. (1931) 35 C.W.N. 838.

the Sessions Judge of Chittoor he was still a Sessions Judge possessing certain powers on account of holding that office; but we find no ground for thinking that a Sessions Judge who has ceased to be the Sessions Judge of one division and has not become the Sessions Judge of another has any powers as a Sessions Judge *simpliciter*. He has jurisdiction to exercise the powers of a Sessions Judge only by virtue of his appointment to a particular Sessions division.

We therefore held that section 367 of the Criminal Procedure Code does not authorise a succeeding Judge to pronounce a judgment of his predecessor. We agree with the learned advocates for the appellants that the moment Mr. Nainar handed over charge to Mr. Panchapakesa Aiyar he became *functus officio* and had no jurisdiction to write a judgment; and Mr. Panchapakesa Aiyar had no jurisdiction to pronounce a judgment based on evidence recorded by Mr. Nainar. If Mr. Nainar had no jurisdiction to write a judgment and if what purports to be his judgment is not a judgment, then the defect, if it may be so called, cannot be cured by section 537 of the Criminal Procedure Code. That section says:

"No finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered, ... on account of any error, omission or irregularity in the . . . . . judgment . . . . . ."

If, as we have held, there was no judgment and if what was pronounced by Mr. Panchapakesa Aiyar was merely an expression of the opinions of Mr. Nainar on the evidence that he had heard, then there was no judgment that could be cured, and the order convicting the appellants was entirely without jurisdiction and therefore void. It would follow that the appellants were not lawfully convicted.

Notice has been given to the third and fourth accused, in whose favour an order of acquittal was passed. Since the order purporting to acquit them was not embodied in a valid judgment they were not legally acquitted.

In the result, Sessions Case No. 38 of 1945, is remanded to the Sessions Court for disposal after re-hearing. In other words, a fresh trial will have to be held by the present Sessions Judge.

K.S. —— *Case remanded for fresh trial.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Patna.)

PRESENT:—LORD THANKERTON, LORD PORTER, LORD DU PARCQ, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Ramanugrah Singh .. *Appellant**

v.

The King-Emperor .. *Respondent.*

Criminal Procedure Code (V of 1898), section 307—Reference—When justified—Powers of High Court—Verdict of jury—Value to be attached to.

Requirements of the ends of justice must be the determining factor both for the Sessions Judge in making a reference and for the High Court in disposing of it under the provisions of section 307 of the Code of Criminal Procedure. In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty according to the view taken by the trial Court, and if the jury take one view of the evidence and the judge thinks that they should have taken the other, the view of the jury must prevail, since they are judges of fact. In such cases a reference is not justified, and it is only by accepting their verdict that the High Court can give due weight to the opinion of the jury. If, however, the High Court considers that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then the reference would be justified and the ends of justice require that the verdict be disregarded. The test of reasonableness on the part of the jury may not be conclusive in every case, for instance where in the light of further evidence placed before the High Court the verdict is shown to be wrong. In such cases the ends of justice would require the verdict to be set aside though the jury had not acted unreasonably on the evidence placed before them. Otherwise the High Court will only interfere with the verdict of the jury if it finds the verdict "perverse, in the sense of being unreasonable," "manifestly wrong" or "against the weight of evidence."

* P. C. Appeal No. 75 of 1945. 18th June, 1946.

Queen v. *Sham Bagdi and others*, (1874) 13 Beng.L.R. App. 19; *Queen-Empress* v. *Dada Ana*, (1889) I.L.R. 15 Bom. 452; *Veerappa Goundan and others*, In re (1928) 55 M.L.J. 591: I.L.R. 51 Mad. 956 (F.B.) and *Emperor* v. *Bai Lali*, (1932) 34 Bom.L.R. 896, approved.

Emperor v. *Ram Chandra*, (1927) I.L.R. 55 Cal. 879; *Emperor* v. *Lyall and others*, (1901) I.L.R. 29 Cal. 128 and *Crown* v. *Barwick*, (1932) I.L.R. 13 Lah. 573, disapproved.

Appeal by special leave from an order of the High Court of Judicature at Patna made on 21st February 1945, convicting the appellant on a charge of murder and sentencing him to transportation for life upon a reference under section 307 of the Code of Criminal Procedure by the Sessions Judge of Patna.

J. D. Casswell, K.C. and *A.G.P. Pullan* for Appellant.

B. MacKenna for the Crown.

Casswell:—The jury had found the appellant not guilty of murder by a majority of 5 to 2. In the letter written by the Sessions Judge to the High Court, he expressed the view that the appellant was guilty of culpable homicide not amounting to murder and liable to punishment under section 304 of the Indian Penal Code, therefore the Sessions Judge did not really disagree with the verdict of the jury as far as the charge under section 302 was concerned. The High Court on the other hand held that the appellant was guilty of murder. In view of this finding by the High Court three questions arise: (1) Can the High Court reverse a verdict of acquittal by a jury on the facts, without finding that the verdict is perverse or unreasonable? (2) Can the High Court convict of an offence of murder when the jury has acquitted of that charge and the Trial Judge is of the opinion that the offence is one of culpable homicide not amounting to murder? (3) Does the evidence if believed establish murder?

As to the first question the weight of authority in India is that in dealing with a reference under section 307, the High Court will only interfere with the verdict of the jury if it finds the verdict perverse in the sense of being unreasonable, manifestly wrong, or against the weight of evidence. This view is supported by the following authorities. *Queen-Empress* v. *Dada Ana*, (1889) I.L.R. 15 Bom. 452; *Emperor* v. *Har Mohan Das*, (1927) I.L.R. 54 Cal. 708; In re *Veerappa Goundan and others*, (1928) 55 M.L.J. 591: I.L.R. 51 Mad. 956 (F.B.) and *Emperor* v. *Bai Lali*, (1932) 34 Bom.L.R. 896. A contrary view has been expressed in *Emperor* v. *Ram Chandra*, (1927) I.L.R. 55 Cal. 879. Here the High Court has not found that the verdict of the jury was perverse or unreasonable, and therefore they had no power to set it aside.

As to the second question both the jury and the Sessions Judge found that the man was not guilty of murder, therefore the High Court had no power to convict the appellant of murder. The High Court has failed to give due weight or any weight to the opinion of the Sessions Judge and the jury. Refers to *Emperor* v. *Madan Mandal*, (1913) I.L.R. 41 Cal. 662 and *Reg* v. *Govinda*, (1876) I.L.R. 1 Bom. 342.

Lastly, the evidence even if accepted is no evidence of murder or culpable homicide. The High Court tried the case "*de novo*" without giving any weight to the opinion of the Sessions Judge or the jury.

MacKenna.—I cannot say which test the High Court applied, namely, that they reversed the verdict of the jury because it was perverse or unreasonable, or that they could act upon their own view of the facts, and they are not bound to accept the opinion of the jury, even if not shown to be unreasonable. If one cannot ascertain what test the High Court applied, it is wrong to imply that the wrong test was applied. Assuming against myself that the High Court adopted the test that they could act upon their own view of the facts, the High Court would not alter the verdict of acquittal to conviction unless satisfied that the man was clearly and manifestly guilty. Therefore if the High Court had approached the case from the view point of the other test they would have reached the same conclusion. In my submission the true construction of section 307 is that the High Court is entitled to enter a verdict of guilty if in the opinion of the High Court reached after considering all the evidence that the man is clearly guilty. Sub-section (3) of section 307 directs the High Court to consider the "entire evidence," there is nothing to prevent the High Court from forming its own opinion. If the section intended that the High Court was bound to acquit, unless the verdict of the jury was perverse or unreasonable then it would have said so, but there are no such words, the only limitation is that the High Court should give due weight to both the opinion of the Sessions Judge and the jury. Refers to *Sheo Swarup* v. *Emperor*, (1934) 67 M.L.J. 865: L.R. 61 I.A. 398: I.L.R. 58 Bom. 650 (P.C.). I use the last passage in this case to support that there is no sufficient material here to show that the High Court have done anything that they should not have done, secondly that no limitation should be read into section 307 which is not expressly mentioned therein. The appellant must show that substantial miscarriage has occurred, and that is not shown by showing that the wrong test was applied as to section 307, there must be something more. Refers to *Emperor* v. *Lyall and others*, (1901) I.L.R. 29 Cal. 128; *Crown* v. *Barwick*, (1932) I.L.R. 13 Lah. 573 and *Emperor* v. *Dwarkanath Goswami*, (1932) I.L.R. 60 Cal. 427.

Lord Thankerton:—There seems to be nothing in the High Court judgment that shows that no reasonable jury could have come to the conclusion on the facts that this jury found.

MacKenna:—To sum up I say that the appeal should be dismissed, because even if the right test had been applied, the High Court would have still reached the verdict that they did. Secondly, the jury's finding cannot be supported on the evidence. It was at least perverse of the jury t say that at least culpable homicide was not proved, when the shot was fired at a distance of only 67 feet.

Their Lordships' Judgment was delivered by

Lastly, if Your Lordships do not accept my construction of section 307, or are of the opinion that the wrong test has been applied, then Your Lordships should send it back to the High Court with directions as to the proper test to be applied under section 307.

SIR JOHN BEAUMONT:—This is an appeal by special leave from an order of the High Court of Judicature at Patna made on the 21st February, 1945, convicting the appellant upon a charge of murder under section 302 of the Indian Penal Code and sentencing him to transportation for life. By the same order the High Court convicted the appellant upon two charges under section 324 of the Indian Penal Code of voluntarily causing hurt by shooting, and sentenced him upon each of these charges to three years' rigorous imprisonment. This appeal relates only to the conviction under section 302.

The judgment of the High Court was given upon a reference made by the Sessions Judge of Patna under section 307 of the Code of Criminal Procedure, and the matter to be determined in this appeal, relates to the duties and powers of a High Court in India upon such a reference. The question has frequently been considered by High Courts in India, but has not been the subject—so far as their Lordships are aware—of a ruling by this Board.

When the matter first came before the Court, the Sub-Divisional Magistrate who dealt with it discharged the appellant and the other accused, being of opinion that the prosecution evidence was such that no Court would be likely to convict upon it. This order of discharge was unheld in appeal by Mr. Salisbury, the then Sessions Judge of Patna; but on an application in revision to the High Court at Patna, that Court took the view that the evidence disclosed a *prima facie* case, and ordered the commitment of the appellant under sections 302 and 324 of the Indian Penal Code, and of the appellant and certain other persons under section 201. Accordingly the Magistrate framed charges against the appellant, first, of committing the murder of Nanku Mahton, being an offence under section 302 of the Indian Penal Code; secondly, of causing hurt to Rajinder Singh by shooting him, being an offence under section 324; thirdly, of causing hurt to Sital Singh by shooting him, being an offence under section 324. There was also a charge under section 201 of causing evidence of the murder to disappear, but nothing turns upon this since the High Court recorded no conviction upon it.

The case was tried before Mr. S. K. Das, the then Sessions Judge of Patna, and a jury. On the 26th August, 1944, the jury returned their verdict, and by a majority of 5 to 2 acquitted the appellant upon the charge of murder under section 302, and by a majority of 4 to 3 convicted him upon the two charges under section 324. The Sessions Judge was dissatisfied with the verdict of the jury upon the charge of murder brought against the appellant, and, being clearly of opinion that it was necessary for the ends of justice to do so, submitted the case of the appellant to the High Court under section 307 of the Code of Criminal Procedure. It appears from the judgment delivered by the learned Sessions Judge and from his letter of reference, that he thought that the jury, in convicting the appellant under section 324, had accepted in substance the case for the prosecution, and that the acquittal of the appellant under section 302 rendered the verdict self-contradictory. But the case cannot be disposed of on so simple a basis. No doubt in convicting the appellant under section 324, the jury must be taken to have rejected the evidence of alibi set up by the appellant, and they may also be taken to have rejected the version of the shooting suggested by the defence in cross-examination of the prosecution witnesses, though supported by no substantive evidence, that the killing of Nanku Mahton and the wounding of Rajinder Singh and Sital Singh were the work of Jodhi Singh, the father of the appellant, acting in self-defence, and that the shooting took place in the dalan of Jodhi's bungalow. But there is no inherent contradiction in the jury holding that there was satisfactory evidence that the appellant wounded two men in the circumstances alleged by the prosecution, but that there was no satisfactory evidence that he killed the third man, or alternatively, killed him in circumstances which rendered the killing culpable

homicide. Any Court called upon to pronounce upon the correctness of the verdict would be bound to consider the evidence.

The question whether the High Court disposed of the reference according to law must depend ultimately on the construction of section 307, of the Code of Criminal Procedure, but before considering the terms of that section, it is desirable to notice other sections of the Code dealing with trials by jury, so as to see how section 307 fits into the general picture. Section 267 provides that all trials under Chapter 23 (which deals with trials before High Courts and Courts of Sessions) before a High Court shall be by jury. Under this section all Sessions cases in the Presidency Towns of Madras, Bombay and Calcutta, where the High Courts possess original criminal jurisdiction, are tried with a jury, and the Code until very recently conferred no right in appeal or revision against the verdict of the jury, though the judge need not accept a majority verdict with which he disagrees. Section 268 provides that all trials before a Court of Sessions shall be either by jury or with the aid of assessors, and section 269 enables the provincial government to direct that the trial of all offences or of any particular class of offences before any Court of Session shall be by jury in any district. Section 297 requires the judge to sum up the evidence to the jury and to lay down the law by which they are to be guided. Section 298 deals with the duties of the judge, who has to decide all questions of law. Section 299 provides that it is the duty of the jury (*a*) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the judge, to be returned, (*c*) to decide all questions which according to law are to be deemed questions of fact. These provisions may be compared with those in section 309 relating to trials with assessors. That section requires the Court to take the opinion of each of the assessors orally and to record such opinion, but expressly provides that in giving judgment the judge shall not be bound to conform to the opinions of the assessors. Section 410 gives to any person convicted on a trial held by a Sessions judge or an additional Sessions judge, a right of appeal to the High Court. Section 418 provides that an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only. Section 423, after conferring various powers on an Appellate Court, directs in sub-section 2 that nothing contained in the section shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

It is clear from these sections of the Code that the legislature drew a sharp distinction between a trial by jury and a trial with the aid of assessors. A jury, aided by the judge, is the final tribunal for deciding the facts; assessors merely aid the judge who decides the facts as well as the law.

It will now be convenient to set out the terms of section 307.

"307. (1) If in any such case (*viz.*, of trial by jury) the judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session."

Under sub-section (1) two conditions are required to justify a reference. The first that the judge must disagree with the verdict of the jury, calls for no comment, since it is obviously the foundation for any reference. The second, that the judge

must be "clearly of opinion that it is necessary for the ends of justice to submit the case" is important, and in their Lordships' opinion provides a key to the interpretation of the section. The legislature no doubt realised that the introduction of trial by jury in the Mofussil would be experimental, and might lead to miscarriages of justice through jurors, in their ignorance and inexperience, returning erroneous verdicts. Their Lordships think that the section was intended to guard against this danger, and not to enable the Sessions judge and the High Court to deprive jurors, acting properly within their powers, of the right to determine the facts conferred upon them by the Code. If the jury have reached a conclusion upon the evidence which a reasonable body of men might reach, it is not necessary for the ends of justice that the Sessions judge should refer the case to the High Court merely because he himself would have reached a different conclusion upon the facts, since he is not the tribunal to determine the facts. He must go further than that and be of opinion that the verdict is one which no reasonable body of men could have reached upon the evidence. The powers of the High Court in dealing with the reference are contained in sub-section 3. It may exercise any of the powers which it might exercise upon an appeal and this includes the power to call fresh evidence conferred by section 428. The Court must consider the whole case and give due weight to the opinions of the Sessions judge and jury, and then acquit or convict the accused. In their Lordships' view the paramount consideration in the High Court must be whether the ends of justice require that the verdict of the jury should be set aside. In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the Trial Court, and if the jury take one view of the evidence and the judge thinks that they should have taken the other, the view of the jury must prevail, since they are the judges of fact. In such a case a reference is not justified, and it is only by accepting their view that the High Court can give due weight to the opinion of the jury. If, however, the High Court considers that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then the reference was justified and the ends of justice require that the verdict be disregarded.

Their Lordships would, however, observe that the test of reasonableness on the part of the jury may not be conclusive in every case. It is possible to suppose a case in which the verdict was justified on the evidence placed before the jury, but in the light of further evidence placed before the High Court the verdict is shown to be wrong. In such a case the ends of justice would require the verdict to be set aside though the jury had not acted unreasonably.

Their Lordships have been referred to many Indian cases on the construction of section 307. In some of them the view has prevailed that in dealing with a reference under section 307, the High Court will only interfere with the verdict of the jury if it finds the verdict "perverse, in the sense of being unreasonable", "manifestly wrong", or "against the weight of evidence". In support of this view their Lordships may refer to: *Queen* v. *Sham Bagdi & others*.[1] *Queen-Empress* v. *Dada Ana*[2]; *Emperor* v. *Har Mohan Das*[3]; In re *Veerappa Goundan & others*;[4] *Emperor* v. *Bai Lalı*,[5] On the other hand, in other cases the view has been taken that the High Court on a reference must act upon its own view of the facts and is not bound to accept the opinion of the jury, even if not shown to be unreasonable. In support of this view, the cases *Emperor* v. *Ram Chandra Roy*[6] *Emperor* v. *Lyall & others*[7]; *The Crown* v. *Barwick*,[8] may be mentioned. For the reasons already given their Lordships agree in substance with the reasoning in the former line of cases, but they would emphasise that the requirements of the ends of justice must be the determining factor both for the Sessions Judge in making a reference and for the High Court in disposing of it.

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1. (1873) 13 Beng.L.R. Appx. 19.
2. (1889) I.L.R. 15 Bom. 452.
3. (1927) I.L.R. 54 Cal. 708.
4. (1928) 55 M.L.J. 591 : I.L.R. 51 Mad. 956 (F.B.).
5. (1932) 34 Bom.L.R. 896.
6. (1927) I.L.R. 55 Cal. 879.
7. (1901) I.L.R. 29 Cal. 128.
8. (1932) I.L.R. 13 Lah. 573.

It remains to consider whether in this case the High Court dealt with the reference in accordance with the principles enunciated above. It may be mentioned that the High Court examined two witnesses, the doctor who had given evidence in the Magistrate's Court but not in the Sessions Court, and a gunnery expert. But their evidence does not appear to have strengthened the prosecution case. The judgment of the Court was delivered by Imam J., Varma J., merely expressing agreement. In the first paragraph of his judgment Mr. Justice Imam observed that since the whole case was before the Court under section 307 of the Code of Criminal Procedure, it was necessary to come to a definite conclusion on the evidence in the case as to whether the present appellant was guilty of the offences with which he had been charged. The learned Judge then discussed in detail various criticisms made by the defence on the prosecution case, and came to the conclusion that the prosecution case was proved. But he did not discuss whether the jury, acting reasonably within their powers, might not have been jutstified in taking a view more favourable to the defence. Indeed, throughout his judgment the learned judge did not mention the jury, and he appears to have attached no weight whatever to their opinion. The judgment is appropriate to an appeal, rather than to a reference under section 307.

Mr. MacKenna for the Crown has however argued that even if the judges of the High Court approached the case from the wrong angle, they would have been bound to reach the same conclusion had they considered the case from the right angle, and that the appeal should be dismissed. It is necessary therefore to refer to some of the material passages in the judgment. Mr. Justice Imam noticed that all the prosecution witnesses were members of the party of Medhabarat, a pleader of Patna, between whom on the one side, and the appellant and his father on the other, bitter enmity existed. The learned Judge said that he had no doubt that having regard to the enmity existing, it was necessary to examine the evidence against the appellant with very great care, and that throughout the hearing of the reference he had had to keep in mind the possibility that the appellant might have been falsely implicated owing to the enmity. The charge that witnesses are biassed always affords a legitimate ground of criticism of their evidence, and often for rejecting it in the absence of corroboration. It was essentially a matter for the jury to decide whether they would accept the evidence of interested witnesses, but Mr. Justice Imam ignores this.

The learned Judge discussed a certain degree of improbability in the story of an incident said to have taken place in Medhabarat's dalan before the actual shooting, and as to this, the learned Judge said :

> "I am unable to say on the evidence on the record that the evidence of the prosecution that an incident took place in Medhabarat's dalan which resulted in his and his companions' flight towards Rikhi Singh's courtyard was so improbable as to be disbelieved. It is true that the evidence is of persons who are hostile to Jodhi Singh and Ramanugrah, but that by itself is not a sufficient reason for discarding the evidence . . . . I can find no sufficient justification for discarding the evidence of the witnesses and I would hold that the prosecution evidence is substantially true regarding the incident at Medhabarat's dalan."

This passage illustrates the disregard, which appears throughout the judgment, of the views of the jury.

The learned Judge then noticed a difficulty which had particularly impressed the Sub-divisional Magistrate and Sessions Judge who had thought in the first instance that no *prima facie* case was made out against the accused. The prosecution case was that the men were shot whilst running away, but the medical evidence showed that they had not been wounded in the back. Mr. Justice Imam considered that the injured men might have been shot when looking round to see the man following them. Clearly the jury cannot be considered unreasonable if they were impressed with a point which a Magistrate and Sessions Judge had thought fatal to the prosecution case.

The learned Judge then noticed the argument that, whilst there was corroboration of the shooting of Rajinder and Sital at the places alleged by the prosecution, in the finding at those places of cartridge caps, pellets, blood-stains and

marks of shot on the surrounding walls, there was no corroboration as to the place where Nanku was alleged to have been killed. As to this the learned judge thought that some corroboration was afforded by the evidence of the Inspecting Officer that he found that at the place where Nanku was supposed to have been shot, the earth had been freshly plastered with cowdung and that he saw faint marks of blood beyond the plastered space. In cross-examination the Sub-Inspector had said that he could not say that the cowdung was just fresh ; an admission which really destroyed the suggestion that the place had been plastered in order to conceal traces of the murder, since the place was examined only a few hours after the shooting. Apart, however, from this, there is nothing to indicate that any of the samples of earth which the Sub-Inspector sent to the chemical analyst to be tested for traces of human blood came from the place marked "D" on the plan where Nanku is supposed to have been shot, and there was no evidence before the jury of any traces of human blood found at "D." Mr. Justice Imam then went on to consider the fact that no pellets were found at the place where Nanku was alleged to have been shot, and that there were no marks of shot on the wall behind that place. As to this Mr. Justice Imam suggested that it was just possible that it did not occur to the Sub-Inspector to examine the wall behind the point "D" more carefully having secured sufficient other evidence No such suggestion seems to have been put to the Sub-Inspector, and the jury can hardly be blamed if they did not accept the view that the Sub-Inspector omitted to examine the one wall really material on the charge of murder, though he had made a very careful examination of the other walls in the vicinity. The absence of any marks of shooting behind the place where Nanku is said to have been shot is difficult to reconcile with the prosecution case as to the line of shooting.

The learned Judge summed up his conclusions in these words :

> "The conclusion therefore at which I have arrived is that the evidence that Ramanugrah fired the gun at village Bareya near the courtyard of Rikhi Singh which caused the death of Nanku Mahton and injured Rajinder Singh and Sital Singh as given by the prosecution is true."

The Court therefore convicted the appellant under sections 302 and 324. The Sessions Judge had expressed the opinion that the offence fell under section 304 and not 302, but the High Court was not bound by this opinion. In their Lordships' opinion had the High Court approached the reference on the right lines and given due weight to the opinion of the jury they would have been bound to hold that the reference was not justified and that the ends of justice did not require any interference with the verdict of the jury. It is impossible to hold that the jury were unreasonable or perverse in taking the view, as they seem to have done, that for the shooting of Rajinder and Sital, who were relations of Madhabaret and working with him, and against whom, therefore, the appellant had some reason for enmity, the story of the eye-witnesses, corroborated as it was by some independent evidence, might be accepted ; but that for the shooting of Nanku, a mere servant for whose murder by the appellant no motive was shown, the story of the eye-witnesses, which was without any corroboration and indeed difficult to reconcile with some of the facts proved, was not one which could be safely accepted. There is nothing inconsistent in these two views.

Mr. MacKenna further suggested that the case should be sent back to the High Court for reconsideration on the lines laid down in this judgment, but as their Lordships are satisfied that reconsideration of the case on such lines could only result in the verdict being upheld, they see no advantage in adopting this course.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed, and the conviction of the appellant under section 302 of the Indian Penal Code and the sentence of transportation for life passed upon him under that section set aside. The conviction and sentences passed on the appellant under section 324 are not the subject of appeal and are not affected by this judgment.

Solicitors for Appellant : *Douglas Grant and Dold.*

Solicitor for Respondent : *Solicitor, India Office.*

H.J.U./K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Ghanta Lakshmayya .. *Appellant**

v.

Ghanta Venkateswarlu being minor by next friend and guardian Narra Pitchayya and another .. *Respondents.*

Hindu Law—Contract for sale of family property by manager—Specific performance—If can be refused on the ground that there are minor coparceners—Alienations by guardian of minor and alienations by manager of joint Hindu family—Distinction.

So far as alienations by guardians of minors are concerned it is now well established that specific performance of such a contract can be refused in the discretion of the Court if the minor should object to it on the ground that there is no mutuality. But such objection cannot be raised in respect of contracts entered into by persons on behalf of joint Hindu families even though some of the members of the joint Hindu family were minors. Accordingly in the case of contracts entered into by a manager of a joint Hindu family on behalf of the family, the contract could be specificially enforced even against the minor members of the family.

Nripendra Chandra Sarkar v. *Ekbarali Joardar*, (1929) I.L.R. 57 Cal. 268 not followed.

Ramakrishna Reddiar v. *Kasivasi Chidambara Swamigal*, (1927) 54 M.L.J. 412 and *Sri Kakulam Subramanyam* v. *Kurra Subbarao*, (1944) 1 M.L.J. 147 distinguished.

Ramachandra Aiyar v. *Sundaramurthi Mudali*, (1893) 4 M.L.J. 9, *Krishna Aiyar* v. *Shamanna*, (1912) 23 M.L.J. 610, *Adinarayana* v. *Venkatasubbayya*, (1937) 2 M.L.J. 653, *Narayanan Chetty* v. *Muthiah Chetty*, (1924) 46 M.L.J. 575 : I.L.R. 47 Mad. 692, *Hari Charan Kuar* v. *Kaula Rai*, (1917) 2 P.L.J. 513, *Dhapo* v. *Ram Chandra*, (1934) I.L.R. 57 All. 374 and *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*, (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232 (P.C.) relied on.

Adinarayana v. *Venkatasubbayya*, (1940) 1 M.L.J. 251 : I.L.R. 1940 Mad. 852 referred to.

The Court will not be justified in using its discretion and refusing specific performance and directing the plaintiff to receive the money paid by him in respect of the debts found to be binding on the sons of the manager.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in A. S. No. 342 of 1944, preferred against the decree of the Court of the District Munsiff of Guntur in O. S. No. 663 of 1943.

Konda Kotayya for Appellant.

P. Somasundaram for Respondents.

The Court delivered the following

JUDGMENT:—The plaintiff is the appellant and the appeal arises out of a suit for specific performance of a contract entered into by the first defendant, the father of the only other defendant, namely the second defendant, who was also the manager of the joint family. The properties which were agreed to be sold were properties belonging to the joint family. Under the terms of the agreement, 4 acres and 5 cents of land which was the only property which the family had then was to be sold for Rs. 1,350. Rs. 350 was received in advance and Rs. 1,000 was to be paid subsequently. The amount of Rs. 350 received in advance was paid to a creditor of the family and Rs. 875 out of the Rs. 1,000 went to discharge a decree debt obtained against the father and the balance of Rs. 125 was paid into Court along with the plaint in the suit. The father was *ex parte* and the second defendant contended that the father was leading a reckless life, that he was keeping a widow and had children by her and that the debts were illegal and immoral and were not binding on the family and that the transaction was not binding on him. The first Court decreed the suit. The Subordinate Judge who heard the appeal found that the decree was capable of being enforced only as against the father's share and not as against the son's share. He also found that specific performance ought not to be granted against the son's share and hence granted a money decree for the money paid by the plaintiff, in pursuance of the contract holding that to that extent the liability was binding on the son. The plaintiff has therefore filed this second appeal and the second defendant, the son, has filed a memorandum of cross objections against the decree directing him to pay the money paid by the plaintiff in respect of the debts of the father which he held to be binding.

*S.A. No. 1740 of 1945. 9th July, 1946.

The memorandum of objections is not pressed before me and is accordingly dismissed.

So far as the appeal is concerned, the learned Subordinate Judge has held that as it is a discretionary relief that was prayed for, the Court in its exercise of discretion can direct the plaintiff to receive the money paid by him in respect of the debts binding on the son, but refused to direct the alienation of the property.

The learned Subordinate Judge has relied upon two rulings of this Court in support of his contention that in such cases he could refuse specific performance. The two cases relied on by him, namely, *Ramakrishna Reddiar* v. *Kasivasi Chidambara Swamigal*[1] and *Sri Kakulam Subramanyam* v. *Kurra Subbarao*,[2] are both cases of two contracts to alienate properties entered into with the guardian of a minor. It is not a case in which the manager of a joint Hindu family entered into any such contract which was sought to be enforced against the other junior members of the family. The decision in *Nripendra Chandra* v. *Ekbarali Joardar*,[3] is no doubt a case in point. The Calcutta High Court has held a view which is not followed by some of the other High Courts including this High Court. In *Ramachandra Aiyar* v. *Sundaramurthi Mudali*,[4], *Krishna Aiyar* v. *Shamanna*[5], *Adinarayana* v. *Venkatasubbayya*,[6] and *Narayanan Chetty* v. *Muthiah Chetty*,[7] this question had to be considered and it was held in all these cases that in the case of contracts entered into by a manager by a joint Hindu family on behalf of the family, the contract could be specifically enforced even against the minor members of the family. In *Hari Charan Kuar* v. *Kaula Rai*,[8] the Full Bench of the Patna High Court has held that such a contract can be enforced. The same was the view taken by the Allahabad High Court in *Dhapo* v. *Ram Chandra*[9]. The Privy Council decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*,[10] is referred to in *Hari Charan Kuar* v. *Kaula Rai*[8], and it was pointed out that the Privy Council decision did not apply to cases of alienations by joint Hindu family managers consisting of minors and adults and this was also pointed out by my learned brother Venkataramana Rao, J., in *Adinarayana* v. *Venkatasubbayya*[6]. This matter was taken in Letters Patent Appeal, vide *Adinarayana* v. *Venkatasubbayya*,[11] but the appellate Court had no occasion to deal with this point. So far as alienations by guardians of minors are concerned it is now well established that specific performance of such a contract can be refused in the discretion of the Court if the minor should object to it on the ground that there is no mutuality. But such objection cannot be raised in respect of contracts entered into by persons on behalf of joint Hindu families even though some of the members of the joint Hindu family were minors. This was pointed out in all these cases cited above both by this Court and by the Allahabad High Court and Patna High Court. In these circumstances, I do not think the learned Judge was justified in finding that on the principles enunciated in *Nripendra Chandra* v. *Ekbarali Joardar*,[3] he will be justified in exercising his discretion and refusing specific performance.

It is next urged before me that there is nothing to indicate that there was any family necessity which would justify the alienation. As already pointed out above there is the finding of both the Courts below that out of the Rs. 1,350 the price agreed to be paid—and there is no evidence to show that on the date of the agreement the price was inadequate—Rs. 350 was received as advance and that the amount was paid to meet the claim of a creditor of the family. There is also evidence that Rs. 875 out of the amount of Rs. 1,000 received in cash went to discharge the decree debt binding on the family. It therefore follows that according to the findings of both the Courts except to the extent of Rs. 125 the entire amount of consideration

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1. (1927) 54 M.L.J. 412.
2. (1944) 1 M.L.J. 147.
3. (1929) I.L.R. 57 Cal. 268.
4. (1893) 4 M.L.J. 9.
5. (1912) 23 M.L.J. 610.
6. (1937) 2 M.L.J. 653.
7. (1924) 46 M.L.J. 575 : I.L.R. 47 Mad. 692.
8. (1917) 2 Pat.L.J. 513 at page 517.
9. (1934) I.L.R. 57 All. 374.
10. (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232 (P.C.).
11. (1940) 1 M.L.J. 251 : I.L.R. 1940 Mad. 852.

was for a purpose which would justify the father alienating the properties. It cannot be said that this is a transaction for which there was no necessity. It must also be remembered that the family owned only one item of property of 4 acres 5 cents and consequently it must be held that the contract was one entered into for a necessity binding on the family. If that be so the contract could be specifically enforced. It is true that subsequent to the filing of the suit the property appreciated in value and that was exactly the reason why the minor was prepared to have a decree for the money though he filed a memorandum of objections which is not now pressed. In these circumstances, I do not think I will be justified in agreeing with the learned Subordinate Judge and finding that this is a case in which the specific performance ought to be refused.

The appeal is accordingly allowed, the decree of the Subordinate Judge is set aside and the decree of the first Court restored. The second defendant will pay the costs of the plaintiff both in this Court and in the lower appellate Court. The memorandum of objections is dismissed but without costs.

Leave refused.

Appeal allowed and memorandum of objections dismissed.

K.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Somasundaram Pillai .. *Petitioner**

v.

The Official Receiver, South Arcot .. *Respondent.*

Provincial Insolvency Act (V of 1920), *sections* 5 *and* 44 (2)—*Madras Agriculturists' Relief Act (IV of* 1938), *section* 21—*Insolvent—Adjudication in* 1930—*Absolute discharge in* 1932—*Estate vested in Official Receiver—Declaration of dividend and disbursement—Petition by insolvent to stay disbursement in order to allow him to claim benefits of the Act IV of* 1938—*Petition to revive his liability after discharge would not lie.*

The petitioner was adjudged an insolvent in 1930. He obtained an absolute order of discharge in 1932, though his properties continued in the hands of the Official Receiver for the purpose of satisfying the proved debts rateably. In 1944 the first dividend was declared and was substantially paid out. The second dividend was pending disbursement, when the petitioner moved the Insolvency Court to stay the disbursement, claiming benefits under section 21 of the Act IV of 1938.

Held, that the debts were no longer, by reason of his absolute discharge, the debts of the insolvent so as to attract the application of section 21 of the Act IV of 1938. They were merely the debts of the estate vested in the Official Receiver's hands.

The petitioner, having by his discharge escaped from the liability of the debts proved in the insolvency, was seeking to revive that liability in order that he might get those debts reduced so as to relieve the burden upon the estate vested in the Official Receiver, in the hope of some remnant coming back to him. This he cannot do.

Petition under section 75 of Act V of 1920, praying that the High Court will be pleased to revise the order of the District Court of South Arcot dated 15th February 1945 and made in C. M. A. No. 52 of 1944, preferred against the order of the Court of the Subordinate Judge of Cuddalore, dated 2nd December, 1944, and made in I. A. No. 53 of 1944, in I. P. No. 1 of 1930.

K. Srinivasan for Petitioner.

T. E. Ramabhadrachariar for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was adjudged an insolvent on 6th August, 1930. He obtained an absolute order of discharge on 11th December, 1932, but his property continued in the hands of the Official Receiver for the purpose of satisfying the proved debts rateably. One dividend was declared in March 1944, and has been substantially paid out. The second dividend is pending disbursement. The petitioner moved the Insolvency Court under section 5 of the Provincial

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*C.R.P. No. 1155 of 1945. 6th March, 1946.

Insolvency Act to stay the disbursement of this dividend, claiming the benefits under section 21 of the Madras Agriculturists' Relief Act (IV of 1938). Section 21 says:

"Nothing contained in this Act shall apply to the debts payable by any person who has been adjudicated an insolvent if prior to the coming into force of this Act a dividend has been declared out of his assets."

It has been held that the words "has been adjudicated an insolvent" refer to an adjudication continuing at any rate up to the date of the Act. The second part of the section says:

"If a dividend has not been so declared, this Act shall apply to the debts payable by such person if he would have been an agriculturist within the meaning of this Act but for his adjudication in insolvency."

Now on the facts of the present case it is conceded that the petitioner obtained an absolute discharge in 1932. Thereafter by reason of the provisions of section 44 (2) of the Provincial Insolvency Act, he was released from all the debts provable in that insolvency. But by reason of the adjudication, the properties still vest in the Official Receiver who has to retain them for the purpose of satisfying the debts proved in the insolvency. But these debts were no longer, by reason of the discharge, the debts of the insolvent. They were merely the debts of the estate vested in the Official Receiver's hands. Therefore, it is impossible to say that these debts proved in the insolvency were debts payable by the petitioner. If he was seeking relief in respect of the debts incurred subsequent to his discharge and before the commencement of the Act he might be entitled to the benefits of the Act provided that he was qualified as an agriculturist and his adjudication which had ceased to affect his status after the discharge would not stand in his way. But that is not the relief which he seeks. He having by his discharge escaped from the liability for the debts proved in the insolvency is now seeking to revive that liability in order that he may get those debts reduced, so as to relieve the burden upon the estate vested in the Official Receiver in the hope of some remnant coming back to himself. That, in my opinion, he cannot do.

The revision petition is dismissed with costs.

K.C. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA AND MR. JUSTICE RAJAMANNAR.

R. T. Ramayya Servai .. *Appellant**

v.

R. Sama Ayyar and others .. *Respondents.*

Suit to recover possession—Adverse title by defendant set up—During suit receiver appointed—Court ordering defendants to pay certain amounts—Time limit fixed for payment—Disobeying of Court orders—Defence struck off by Court—Decree for plaintiff—Direction to pay into Court sale price in his hand—No power in Court to strike off defence—No power to direct payment of sale price into Court—Order XI, rule 21, Civil Procedure Code (V of 1908) not applicable.

The plaintiff (first respondent) filed a suit to recover possession of suit properties from first defendant, who was alleged to have been in possession as agent or lessee of plaintiff. The plaintiff's contention was that he had purchased the property under Ex. P-1 and that the first defendant was unlawfully setting up adverse title. The first defendant denied the plaintiff's right and alleged that the sale in favour of plaintiff was benami for himself. As the sale to plaintiff was subject to a mortgage only, the balance of money was paid to the vendor, the rest of the sale price having been retained by the vendee to be paid to the mortgagee on ascertainment of actual dues after the decision in certain scaling down proceedings under the Agriculturists' Relief Act. During the suit for recovery of possession from defendants 1 and 4 to 6 who were all in possession of the properties for cultivation purposes, a Receiver was appointed and the Court directed the defendants to pay certain sums to the Receiver. Since the amounts were not paid in full and even the time limit fixed by Court for such payments was exceeded, the defence was struck off by order of Court. Thereafter evidence was let in for plaintiff and a decree passed in his favour. On the question whether the Court had power to strike off defence in the circumstances and to pass a decree in plaintiff's favour directing him, in turn, to pay the sale amount into Court,

* Appeal No. 497 of 1944. 9th July, 1946.

Held, that this case did not fall within the specific provisions of the Code of Civil Procedure giving power to Courts to strike off defence (O. XI, r. 21). The proper procedure would have been to direct the Receiver to take possession forthwith and to take other proceedings for recovery of the amount due from the defendant. But that would not justify the drastic order of striking out the defence on the ground that the amount ordered to be paid was not paid within time given.

Held further, that the decree in favour of the plaintiff directing him at the same time to pay into Court the amount of sale price retained in his hand was not proper. The plaintiff was entitled to an unconditional decree for possession, leaving the vendor to take independent proceedings to recover the unpaid purchase money.

Appeal against the decree of the District Court, East Tanjore at Negapatam, in O. S. No. 21 of 1943, dated 28th July, 1944.

K. S. Desikan and *K. Raman* for Appellant.

M. S. Venkatarama Aiyar, *R. Venkataraman* and *A. V. Viswanatha Sastri* for Respondents.

The Judgment of the Court was delivered by

Somayya, J.—The first defendant is the appellant. The appeal is against the decree of the District Court of East Tanjore passed in O. S. No. 21 of 1943. The plaintiff (first respondent) filed the suit to recover possession of the suit properties from the first defendant who is alleged to be in possession as agent or lessee of the plaintiff. The property originally belonged to one Anantharama Aiyar who mortgaged it to the second defendant's father in the year 1919. Anantharama Aiyar sold it to one Venkatasubramania Aiyar in the year 1920 directing him to pay off the mortgage. That was not done and Venkatasubramania Aiyar died. The mortgagee filed O. S. No. 52 of 1930 and got a decree for about Rs. 15,000 against the sons of Venkatasubramania Aiyar. That decree is being executed and it is pending as an application for scaling down the decree debt has been filed under the Madras Agriculturists' Relief Act. Venkatasubramania Aiyar's sons sold the property on the 20th of January, 1942, for Rs. 19,000 and the sale deed stands in the name of the plaintiff. A sum of Rs. 1,000 was paid and Rs. 18,000 was reserved with the vendee for being paid over to the mortgagee decree-holder after the amount due to him is ascertained in the scaling down proceedings. The plaintiff says that he purchased the property under Ex. P-1 and that the first defendant is unlawfully setting up adverse title. The first defendant who is the contesting defendant denied the plaintiff's right and alleged that the sale in favour of the plaintiff was benami for himself. The main issue in the suit is whether the purchase in the name of the plaintiff was benami for the first defendant's benefit.

It would appear that the first defendant is in possession of some of the properties and that the other properties are in the possession of other persons who are cultivating them. During the course of the suit a receiver was appointed and the Subordinate Judge allowed defendants 1 and 4 to 6 to cultivate the lands during the pendency of the suit and directed them to pay certain sums to the receiver. The amounts directed to be paid by defendants 1 and 4 to 6 were not paid in full; and after repeated orders the Subordinate Judge ultimately passed an order saying that if the amount was not paid by a particular date the defence will be struck off. Even by the time given the amount was not paid and the defence was therefore struck off by an order dated 14th April, 1944. Thereafter evidence was recorded on behalf of the plaintiff and a decree was passed. The first defendant appeals and the main objection is that the lower Court had no power to pass an order directing the defence to be struck off for non-payment of the amount in question and that even if the Court had such a power the circumstances of this case did not justify the order which the lower Court has passed.

It is clear that the case does not fall within the specific provisions of the Code of Civil Procedure giving power to Courts to strike off a defence in certain contingencies. Order XI, rule 21 of the Code provides:

"Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out . . . . ."

No other provision has been brought to my notice relating to the power of the Court to strike out a defence. It is very doubtful whether section 151 of the Code on which reliance is placed by the learned advocate for the respondents would apply in a case where there is a specific provision enacted by the Legislature. It is not as if the Legislature has omitted to provide for the case of striking out a defence. The Legislature has provided that under circumstances set out in rule 21 of Order XI, the Court may strike out a defence. A decision of Sundaram Chetti, J., reported in *Venkatacharyulu* v. *Manchala Yesobu*[1] has been brought to our notice. In an application for appointing a receiver, one of the defendants offered to give security and he was directed to furnish security by a particular date. He furnished a security bond and the Court ordered the testing of the sufficiency of the security by issuing a warrant to an Amin to investigate the matter. The necessary batta for the issue of process was not paid by the defendant but he cut and carried away the crops on the suit land. The Court subsequently passed a further order that a certain sum of money should be deposited in Court within a particular date. The defendant defaulted and his defence was struck off. The learned Judge held that section 151 of the Civil Procedure Code gave jurisdiction to the Court to pass the order which it did. The learned Judge held that as one of the parties after avoiding the appointment of a receiver, on offering to give security entered upon the land and cut and carried away the crops without paying the batta for the testing of the sufficiency of the security offered by him, the conduct of the party amounted to a contempt of Court. There is no difficulty in agreeing with the learned Judge's order so far, but it is very doubtful whether even in such a case the Court can order the defence to be struck off. Two decisions are referred to by the learned Judge and the first of them is *Gauri Shankar* v. *Mt. Manki Kunwar*[2]. That decision had reference to an order to answer certain interrogatories and it is covered by Order XI, rule 21 of the Code to which reference has already been made. The other case referred to is the one reported in *East Indian Railway Co.* v. *Jit Mal Kallu Mal*[3]. That refers to a case of a defendant obtaining an adjournment on condition that if he did not pay the day cost ordered within a particular time his defence might be struck off. In a case where a party obtains an indulgence on condition of his defence being struck off if he did not pay a particular sum within a given date it might be said that he cannot go back upon his own agreement and that he must be held bound to the agreement. If he had not agreed to such an order the suit would have been proceeded with on that very day and the result would be that the suit would be proceeded without his being in a position to defend the suit. We are of opinion that these two decisions do not afford any help.

Further, we are of the opinion that the lower Court was not justified in passing the order which it did on the 14th of April, 1944. The defendant was in possession and a receiver was appointed. Ordinarily, the receiver must be left to take his own steps to recover possession from the persons in possession. If the defendant did not pay the amount in spite of repeated orders it may be that he rendered himself liable to be proceeded against for contempt of Court. The proper procedure would have been to direct the receiver to take possession forthwith and to take other proceedings for recovery of the amount due from the defendant. But that does not justify the drastic order of striking out the defence if the amount ordered to be paid was not paid within the time given.

The result is that the appeal succeeds, the decree of the lower Court is set aside and the suit remanded for disposal according to law. As the plaintiff respondent states through his advocate that he did not invite the order under appeal we order that the costs of this appeal should abide and be provided for in the revised decree of the trial Court. The court-fee paid on the memorandum of appeal will be refunded.

1. (1931) 61 M.L.J. 477.
2. (1923) I.L.R. 45 All. 624.
3. (1925) I.L.R. 47 All. 538.

The lower Court while passing a decree in favour of the plaintiff directed him to pay into Court a sum of Rs. 18,000 which was left with him under Ex. P-1. We fail to see how this order came to be passed or what power the Court had to make this order. It is not supported before us. Even where a vendor is not paid the price and the vendee files a suit for possession this Court has held that the vendee is entitled to an unconditional decree for possession leaving the vendor to take independent proceedings to recover the unpaid purchase money. We allow the plaintiff to take back the amount which he has paid into Court.

K.C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUPPUSWAMI AYYAR.

Patell Thimma Reddi and another .. *Appellants**

v.

Lakkireddigari Chinna Ranga Reddi and others .. *Respondents.*

Hindu Law—Joint family—Alienation—Re-marriage of coparcener—Expenses of—If family necessity binding on the family estate.

The expenses of a second marriage of a member of a Hindu joint family are not binding on the family estate as they cannot be regarded as a family necessity. Re-marriage cannot be regarded as essential. The first marriage of a Hindu is a sacrament and an initiatory ceremony. The second marriage is not. Religious rites which are required to be performed in the married state can be performed by a widower by virtue of his first marriage. If he wishes to re-marry, the expenses incurred should in fairness come out of his own assets and if he has no separate property, out of his share in the family estate.

Nataraja Dikshitar v. *Mahaganapathi Dikshitar*, (1942) 1 M.L.J. 522 and *Onkar* v. *Kisan Singh*, A.I.R. 1930 Nag. 282, approved.

Bhagirathi v. *Jokhuram Upadhia*, (1910) I.L.R. 32 All. 575, dissented from.

Appeal against the decree of the Court of the Subordinate Judge, Anantapur, in A. S. No. 142 of 1944, preferred against the decree of the Court of the District Munsiff, Gooty, in O. S. No. 88 of 1943.

E. Vinayaka Rao for Appellants.

Kasturi Seshagiri Rao for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question which the Court is called upon to decide in this case is whether the expenses of a second marriage of a member of a joint family are binding on the family estate.

The first defendant was married in 1924 and by this wife he had a son. She died and he married again when the son by his first wife was about 7 years of age. For the expenses of the second marriage, he borrowed money and in order to repay the debt he alienated property belonging to himself and his two younger brothers, with whom he was joint. The youngest brother challenged the validity of the alienation. The trial Court (the Court of the District Munsiff of Gooty) and the first appellate Court (the Court of the Subordinate Judge of Anantapur) held that the alienation was not binding on the shares of the younger brothers. The alienee now asks for the decision of this Court.

In *Kameswara Sastri* v. *Veeracharlu*[1], a Bench of this Court held that marriage was one of the necessary samskaras or religious rites and that the expenses of the marriage of a coparcener constituted a legal necessity. It mattered not whether the family were Sudras or of one of the twice-born classes. The necessity was justified as an alienation by the manager, not in the sense that it was absolutely indispensable, but according to Hindu ideas it would be regarded as reasonable and proper. This decision related to a first marriage.

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* S. A. No. 1204 of 1945. 15th July, 1946.

1. (1910) 20 M.L.J. 855 : I.L.R. 34 Mad. 422.

The question whether the expenses of the second marriage can be regarded as a family necessity was considered by Venkataramana Rao, J., in *Nataraja Dikshitar* v. *Mahaganapathi Dikshitar*[1]. In that case the joint family consisted of two brothers aged 13 and 9 years respectively. The elder brother married, but his wife died soon afterwards. While he was still a minor his mother arranged a second marriage for him and to meet the expenses, she executed a usufructuary mortgage. The mortgagee leased the property back to the family, but as the rent agreed upon was not paid, he sued to eject the brothers who contended that as the mortgage was created for the expenses of the second marriage, it was not binding on the family. The learned Judge accepted this contention. He said that there could be no justification for the second marriage of a minor. Even in the case of an adult it could not be regarded as an obligation.

A similar view was taken in *Onkar* v. *Kisan Singh*[2]. The appellant contends that regard should not be had to this case because the coparcener who married was then between 40 and 45 years of age and it was his fourth marriage. The learned Judge who heard the appeal did not base his decision merely on these facts. He examined the texts and found that they did not regard re-marriage as essential.

For the appellant great reliance has been placed on the judgment of the Allahabad High Court in *Bhagirathi* v. *Jokhuram Upadhia*[3], where an alienation to meet the expenses of the second marriage of a Hindu widower was regarded as an alienation for a lawful necessity binding on the widower's son by his first wife. The widower was 28 years of age and the son was nine years of age. The decision was based largely on the age of the widower and the fact that he had a young son. It was, however, accepted that every second marriage could not be regarded as a legal necessity. We are not prepared to follow this case. We consider that the correct principle was applied in *Nataraja Dikshitar* v. *Mahaganapathi Dikshitar*[1] and *Onkar* v. *Kisan Singh*[2].

The first marriage of a Hindu is a sacrament and an initiatory ceremony. The second marriage is not. Religious rites which are required to be performed in the married state can be performed by a widower by virtue of his first marriage. It may be very desirable in the circumstances in which he finds himself for a widower to marry again, but as neither his personal law nor his religion require him to contract a second marriage, it is difficult to see what justification there can be for saddling the expenses of the second marriage on the family estate. If he wishes to re-marry, the expenses incurred should in fairness come out of his own assets and if he has no separate property, out of his share in the family estate.

We dismiss the appeal with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Kuppuswami Mudali .. *Appellant**

v.

Thangavelu Mudaliar and another .. *Respondents.*

Hindu Law—Alienation by one of two sisters of her share in property inherited from father not binding on reversioners—Limitation Act (IX of 1908), Articles 120 and 125—Suit by reversioners for declaration that alienation is not binding—Article 120 applicable—Both the reversioners born at the time of alienation—Suit by one barred—Suit by the other not necessarily barred.

Two sisters *A* and *K* inherited the property of their father and some sort of division was effected between them. *A* sold her share to the defendants. *K*'s sons who were both born at the time of the alienation and one of whom was a minor at the time of the suit filed the suit as reversioners for a declaration that the alienation by *A* is not binding on them.

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1. (1942) 1 M.L.J. 522.
2. A.I.R. 1930 Nag. 282.
3. (1910) I.L.R. 32 All. 575.

* S. A. No. 68 of 1946. 1st April, 1946.

Held, (1) Assuming that the alienation was supported by consideration and for necessity, *A*, one of the daughters cannot by herself alienate the property so as to be binding on the male reversioners after the death of *A* and *K*. *Yelumalai* v. *Natesachari*, (1944) 1 M.L.J. 201 : I.L.R. 1945 Mad. 35; *Sri G. Radhamani* v. *Maharani Sri Pusapati Alakarajeswari*, (1892) L.R. 19 I.A. 184 : I.L.R. 16 Mad. 1 (P.C.), followed.

(2) On the question of limitation the proper article to be applied is Article 120 and not article 125.

(3) Where two reversioners were born on the date of alienation and one of them continues to be a minor on the date of the suit, he is not barred, because another reversioner who was also alive on the date of the alienation waited until his right became barred. The right which two sons of a daughter acquire in the maternal grandfather's property is a joint right because they take the property with mutual rights of survivorship but not a coparcenary right and the elder brother cannot give a valid discharge on behalf of his younger brother.

Ramayya v. *Veerabhadrachari*, (1944) 2 M.L.J. 117, referred to; *Veramma* v. *Gopaladasayya*, (1918) 35 M.L.J. 57 : I.L.R. 41 Mad. 659 (F.B.), explained.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 25 of 1944, preferred against the decree of the Court of the District Munsiff of Tiruppattur in O. S. No. 451 of 1943.

B. V. Viswanatha Aiyar for Appellant.

T. L. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—Plaintiffs-respondents filed the suit out of which this second appeal arises for a declaration that the alienation made by Alamelu Ammal is not binding upon them. The properties belonged to one Ayyaswami Mudali who died in the year 1902 leaving a widow Nagammal and two daughters Alamelu Ammal and Kuppammal. Nagammal died in 1924 and thereupon Alamelu Ammal and Kuppammal inherited the property as the daughters of the last male holder. It is common case that some sort of division was effected between Alamelu Ammal and Kuppammal and there is a question whether this division was only for convenient enjoyment or whether it was an absolute partition by which the right of the survivor to recover the property on the death of the predeceased sister was also given up. This question has not been gone into for two reasons : firstly that Kuppammal is not a party to the alienation and secondly that the matter can be disposed of without going into this question, because assuming that the alienation was supported by consideration, Alamelu Ammal one of the daughters cannot by herself alienate the property so as to be binding on the male reversioners after the death of Alamelu Ammal and Kuppammal. It is enough to refer to the decision of this Court in *Yelumalai* v. *Natesachari*[1] which follows a decision of the Judicial Committee in *Sri G. Radhamani* v. *Maharani Sri Pusapati Alakarajeswari*[2]. In this case Alamelu Ammal alone sold the property and therefore even if it was for a necessity which is disputed by the other side, the alienation will not bind the ultimate reversioners. On this short ground the plaintiffs-respondents are entitled to a declaration that the alienation by Alamelu Ammal under Ex. P-1 is not binding on them after the death of both Alamelu Ammal and Kuppammal. The question whether the sale would be binding on Kuppammal in case she happens to survive Alamelu Ammal need not be decided in this suit. If the division was an absolute one in the sense I have already indicated, then Kuppammal would have no right to recover the property from the appellant after the death of Alamelu. The alienee would be entitled to enjoy the property at least till the death of Kuppammal. But if the division was only for convenient enjoyment, then Kuppammal if she happens to survive Alamelu Ammal, can recover the property from the appellant if she filed a suit within 12 years from Alamelu Ammal's death. But whatever may be the right of the alienee as against Kuppammal, he has no right as against the male reversioners, *i.e.*, the daughter's sons or any other persons who happen to be the actual reversioners after the death of the two daughters.

1. (1944) 1 M.L.J. 201 : I.L.R. 1945 Mad. 35. (P.C.).
2. (1892) L.R. 19 I.A. 184 : I.L.R. 16 Mad. 1

The next question argued by Mr. Viswanatha Aiyar the learned advocate for the appellant is that the suit is barred by limitation. He rightly urges that the proper article of the Limitation Act applicable in this case is not Article 125 but Article 120. Article 125 does not apply because the plaintiffs would not be entitled to the property if Alamelu Ammal was dead on the date of the suit. Article 125 runs thus :—

"Suit during the life of a Hindu female by a Hindu.......................who, if the female died at the date of instituting the suit would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage."

In this case if Alamelu died at the time of the alienation and if the plaintiffs were entitled to possession of the land on that date, then Article 125 would apply to a suit for a declaration that the alienation by her is void except during her lifetime or until re-marriage. But in this case if Alamelu was dead on the date of the suit, the plaintiffs would not be entitled to possession, because there is Kuppammal. If the division between two sisters was an absolute division, then the appellant himself would be entitled to possession of the property during the lifetime of Kuppammal and the plaintiffs-respondents would not be entitled to possession on the date of the suit. If on the other hand, the partition was one for convenient enjoyment, even then the plaintiffs would not be entitled to possession, because Kuppammal as survivor would be entitled to be in possession of the property. Therefore, this contention of Mr. Viswanatha Aiyar is right. But the difficulty is that even accepting the argument of Mr. Viswanatha Aiyar, the proper article of the Limitation Act would be 120 ; that is

"A suit for which no period of limitation is provided elsewhere in this schedule"

and the plaintiff would have six years from the date when the right to sue accrued. Here the two plaintiffs are the sons of Kuppammal. In the plaint the first plaintiff is described as aged 20 and the second plaintiff as aged 15. If the first plaintiff was only 20 on the date of the suit, then clearly section 6 of the Limitation Act applies and the suit would be within time. But the defendant has averred in the written statement that the first plaintiff was more than 22 years on the date of the suit and the question whether the first plaintiff was below 21 on the date of the suit has not been tried. But that apart, even if we assume that the first plaintiff was over 21, the question would still remain whether the suit would not be saved by section 7 of the Limitation Act. In the present case, the two plaintiffs have a joint cause of action ; in fact as Mr. Viswanatha Aiyar says if there is only one cause of action which accrues to all the reversioners and the suit whether filed by the first plaintiff or the second plaintiff is a representative suit the benefit of which will enure to all the reversioners alike. Therefore it is a joint right which accrued on the date of the alienation to both the first and second plaintiffs. The second plaintiff had been born by the date of the alienation and therefore he also got a right to question the alienation made by Alamelu Ammal. That being so section 7 clearly applies. In that case unless the first plaintiff was capable of giving a valid discharge on behalf of his younger brother, time will not begin to run against either of the plaintiffs. If the true view is that it is not a joint cause of action but separate causes of action, each reversioner gets a separate right to question the widow's alienation. Then the consequence will be that the second plaintiff's right which on this hypothesis is a separate cause of action will not be barred even though the first plaintiff is barred and a declaration obtained by the second plaintiff will be on behalf of all the reversioners and will benefit the first plaintiff equally along with the other reversioners who are not joined in the suit.

It is then argued by Mr. Viswanatha Aiyar on the authority of the Full Bench decision in *Varamma* v. *Gopaladasayya*[1], that the second plaintiff had no independent cause of action and that if the first plaintiff's right is barred, the second plaintiff is also barred. In that decision the learned Judges had to deal with a case where the person who filed the suit was not born on the date of the alienation and the right of the existing reversioner to file a suit had become barred by lapse of time.

1. (1918) 35 M.L.J. 57 : I.L.R. 41 Mad. 659 (F.B.).

The plaintiff who was born long after the alienation said that he had independent cause of action on his birth and that he being a minor, his rights are saved until he himself attains majority and more than three years elapsed after that. It is this contention that was negatived by the Full Bench decision in the above case. That is not an authority for the position that even if the two reversioners were born on the date of the alienation and one of them continues to be a minor on the date of the suit, he is nevertheless barred, because another reversioner who was also alive on the date of the alienation waited until his right became barred. As pointed out by me in *Ramayya* v. *Veerabadrachari*[1], a right which two sons of a daughter acquire in the maternal grandfather's property is a joint right, because they take the property with mutual rights of survivorship ; but it is not a coparcenary right in which case alone it could be said that the elder brother has the right of giving a valid discharge on behalf of his younger brother. In that case two daughters' sons inherited their maternal grandfather's property and the suit was filed more than three years after the elder attained majority. That I held would not bar the suit either as against the younger brother or against the elder brother. That is the effect of section 7. If that would be so as regards a suit filed by the plaintiffs for possession after the death of Alamelu Ammal and Kuppammal, the answer must be the same where the suit is filed before the reversion opens and that for a declaration that the alienation made by their mothers is not valid and binding on them. In either case it is a joint right. One of them alone is not entitled to give a discharge without the concurrence of the other as it is not a coparcenary right and hence under section 7 the entire suit is within time.

The second appeal fails and it is dismissed with costs. (No leave.).

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

N. P. Ganapathy Naicker and others .. *Petitioners**

v.

A. M. Govindarajulu Naidu .. *Respondent.*

Security bonds—Time-limit for filing—Draft bond filed in time—Testing of security exceeding time prescribed —Whether ground for rejection of application to accept security filed.

Where an application by the petitioners to accept security furnished as per direction of the Court was dismissed on the ground that though the draft bond was filed in time the testing of the security exceeded the time limit allowed for filing of the bonds,

Held, that the application to accept security should be restored. It was sufficient compliance with the order, if the security had been tendered in time, and it was not necessary that the testing of security itself should be within that time.

52 M.L.J. short notes 53; *Ranganayaki Nadar* v. *Pichaimani Nadar*, (1941) 2 M.L.J. 291, followed.

If a party concerned carries out the order of Court directing him to furnish security and, in doing so, does all that lies in his power within the time by way of tendering security it would be sufficient. If in the end the security that is furnished within the prescribed time is found, after testing, to be insufficient and is rejected, the requirements of the order have not been satisfied. In that case the Court will be entitled to reject the application for accepting the security.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Vellore, dated 21st August, 1945, in E.A. No. 216 of 1945 in O.S. No. 6 of 1940.

N. K. Mohanarangam Pillai and *M. V. Gopalaratnam* for Petitioners.

K. S. Desikan for Respondent.

The Court delievered the following

JUDGMENT:—This revision petition arises out of an application made by the petitioners herein, in the Court of the Subordinate Judge of Vellore to accept the

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1. (1944) 2 M.L.J. 117.

* C. R. P. No. 1457 of 1945. 22nd March, 1946.

security tendered by them and to permit them to file fair bonds. With the details of the matter itself we are not concerned. It is sufficient to mention that, when an application was made in the second appeal arising out of a suit, for stay of execution of the decree, this Court ordered that the petitioners should furnish security to the satisfaction of the lower Court within one week of the reopening of that Court after the summer recess. The draft security bond, prepared on plain unstamped papers, was filed on the day when the Court of the Subordinate Judge reopened after the summer recess. It took some time for getting it tested, with the result that the week's time given in the order of this Court elapsed. But the learned Subordinate Judge dismissed the petition, holding that it was incumbent upon the petitioners to file a registered and completed security bond within the time allowed and that the time would not get automatically extended if it was found necessary to get the bond tested.

For this purpose, the learned Subordinate Judge relied on the decision of King, J. in *Chathiyelan Kanna Kurup* v. *Raman Nayar*[1]. That was a case which turned exclusively upon the language of section 17 of the Provincial Small Cause Courts Act. The learned Judge took the view that in section 17 an alternative is given, namely, that if the decree was to be set aside, the decree amount should be deposited or adequate security furnished. It was considered by King, J. that if on an interpretation of section 17, no deposit of the decree amount could be made after the lapse of thirty days it should be equally assumed that the security which was only an alternative, should also be furnished in a completed form within the same specified period. In taking this view the learned Judge followed the decision of Ramesam, J., in *Balakrishna Iyer* v. *Pichamuthu Pillai*[2], which is also a case which arose under section 17 of the Provincial Small Cause Courts Act. King, J., in the decision just cited however took note of the fact that under the general law a different view had been taken in this Court. In a short note case reported in 52 M.L.J. (Short Notes) page 53, Jackson, J., held that, where security was ordered to be furnished within a particular time in an application for stay of sale, if security, was tendered within the time, even though tested after the time, and it proved to be eventually sufficient the petitioner must be deemed to have complied with the order of the Court and no petition for extension of time was necessary. This view was followed by Happell, J., in a recent decision in *Rangaswami Nadar* v. *Pichaimani Nadar*[3]. The learned Judge was of the opinion that if security is tendered within the time given, it is a sufficient compliance with the order and the appeal cannot be rejected unless the security is tested and rejected, even though the testing is after the time fixed for furnishing it: the testing of the security itself need not be within the time. It is not necessary to consider the cases that have arisen under the Provincial Small Cause Courts Act, which, as pointed out, have proceeded upon the particular language of section 17, but the general principle is as laid down by Jackson, J. and Happell J. in the cases mentioned above. In practical working, it will amount to a denial of the relief to the party if it should be held that in such circumstances the entire process of tender, testing, approval by Court and registration should be completed within the limited time that will usually be allowed to the party. It would be sufficient, in my opinion, if the party concerned carries out the order of the Court directing him to furnish security and, in doing so, does all that lies in his power within the time by way of tendering security. If in the end the security that is furnished within the prescribed time is found after testing to be insufficient and is rejected, then the requirements of the order have not been satisfied. In such a case, the Court will be entitled to reject the application for accepting the security. In this view, it is not material to consider whether the draft security bond in this case could be furnished on plain unstamped papers or whether it should have been stamped with the requisite stamp, especially when as stated in the District Munsiff's order what was

1. (1942) 2 M.L.J. 425.
2. (1921) 15 L.W. 186.
3. (1941) 2 M.L.J. 291.

required to be filed was a registered security bond and production of a registered security bond duly approved by the Court within a week was physically impossible.

This revision petition is allowed with costs. The petition in the lower Court will be restored and proceeded with according to law and in the light of the directions given in this order.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Venkataswami Naicker .. *Petitioner**

v.

Balakrishna Naicker and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 32, rule 7—Compromise out of Court—Leave of Court not obtained—No record in proceedings—Minor not bound by compromise—Suit for partition—Final decree not passed—Suit deemed to be pending.

A suit for partition after setting aside certain alienations was filed by the plaintiff by his next friend against the father and alienees. The preliminary decree was passed on 9th April, 1932, and the suit adjourned to 15th April, 1932, for the purpose of depositing Rs. 30 for payment to the Commissioner appointed to divide the property. No payment was made and the Court passed the order 'closed.' In October 1933, the minor's next friend entered into a compromise out of Court with the concerned parties. He died in 1936 and in 1945 within three years of his attaining majority the plaintiff filed an application for declaring him a major and agreeing to deposit the Rs. 30 and asking for the appointment of a Commissioner for dividing the suit properties.

Held (1) the order "closed" is clearly not an order of disposal or dismissal and even if it did amount to a dismissal, after a preliminary decree and before a final decree is passed the suit will still be held to be pending.

(2) The conduct of the next friend in failing to deposit the commission fee within the date specified would not amount to an abandonment of claim and could not bind the minor or prevent him from questioning the same within three years after his attaining majority.

(3) Where no leave of Court has been obtained with regard to the compromise and not expressly recorded in the proceedings, such compromise is voidable by the minor against all parties and no plea of such compromise as an adjustment of the claim could be put forward by the defendants.

Lachmi Narain Marwari v. *Balmukund Marwari*, (1924) 47 M.L.J. 441 : I.L.R. 4 Pat. 61 : L.R. 51 I.A. 321 (P.C.) referred to; *Chhaba Lal* v. *Kallu Lal*, (1946) 1 M.L.J. 339 (P.C.) and *Mariam Bibi* v. *Amna Bibi*, I.L.R. 1937 All. 317 (F.B.). followed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Srivilliputtur, dated 23rd November, 1945 in I.A. No. 269 of 1945 in O.S. No. 836 of 1930.

T. S. Vaidyanatha Aiyar for Petitioner.

N. Rajagopala Aiyangar for Respondent.

JUDGMENT.—The first defendant in O.S. No. 836 of 1930 on the file of the District Munsiff's Court, Srivilliputtur, is the petitioner in this proceeding. That suit was brought by the plaintiff represented by his next friend and it was a suit for partition after setting aside some alienations. In that suit the petitioner here, who is the father of the first respondent, was made the first defendant. The second defendant was his mother. The third defendant was his grandmother, and defendants 4 and 5 were the alienees. They are respectively respondents 2, 3, 4 and 5 in this matter. A preliminary decree was passed in the suit on the 9th April, 1932, and thereafter the suit was adjourned to 15th April, 1932 for the purpose of depositing Rs. 30 for payment to the Commissioner to be appointed to divide the property. No payment was made, and on 15th April, 1932 an order was passed by the Court saying that the case was "closed". The parties took no further steps in the matter; but on 14th October, 1933 it would appear that the minor's next friend entered into a compromise out of Court with the concerned parties. With the details of that compromise we are not concerned here. In 1936 the next friend of the minor plaintiff first respondent died. The plaintiff, who was all the

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* C. R. P. No. 1585 of 1945. 22nd April, 1946.

time a minor, admittedly attained majority on the 21st August, 1944 and filed the present application on the 16th April, 1945 under Order XXVI rules 13 and 14, for declaring him as a major. He agreed to deposit the sum of Rs. 30 directed to be deposited by the Court and asked for the appointment of a Commissioner and for an order to divide the suit properties in two equal halves in accordance with the the directions given in the preliminary decree. This application was made on the footing that the final decree had not been passed and that for that purpose the proceedings were still on foot. The first respondent's application was allowed in the Court below and he was declared a major and was directed to deposit the commission fees by a specified date.

Three objections were raised before the learned District Munsiff to the first respondent's application. The first was that the application was not maintainable because the conduct of the next friend in not depositing the commission fees on the 15th April, 1932 amounted to an abandonment of the claim. The second objection was that the application was not in time, and the third objection was that there was a waiver on the part of the plaintiff and hence he was estopped from instituting the petition. The learned advocate for the petitioner was not able to satisfy me that any of these objections are tenable. I fail to see how the application is not maintainable on the ground that the next friend failed to desposit the commission fee within the date specified and how that conduct would amount to an abandonment of the claim, and how such an abandonment would bind the minor or would prevent him from questioning these proceedings after attaining majority. On the question of limitation also, the minor was obviously entitled within three years after attaining majority to repudiate the transactions and it is not clear that there was any waiver or estoppel arising from the circumstance or from the conduct of the parties.

The real contention put forward before me on behalf of the petitioner is that, although the minor after attaining age is entitled to seek to avoid the compromise that was entered into on his behalf by his next friend, it is open to him (the petitioner) to plead the compromise as an adjustment of the claim and his complaint was that this particular plea of adjustment was not considered in the Court below. I do not find from the judgment of the lower Court that any such objection or plea was raised precisely in that form. The learned advocate for the petitioner relies on the decision of the Privy Council in *Madan Theatres Ltd.* v. *Dinshaw and Co., Bankers, Ltd.*[1], from which it appears that such a plea of adjustment would be tenable. But in that case there was no difficulty arising from the minority of a party and there was no need to consider the scope, effect and operation of Order XXXII, rule 7 of the Civil Procedure Code. Mr. Rajagopala Aiyangar, the learned advocate for the respondent, while conceding that it may be open to the petitioner to plead and put forward such adjustment in appropriate cases, contends that in this case Order XXXII, rule 7 is a complete bar to the raising of such a plea. Under that rule it is incumbent upon a next friend or guardian of a minor in a suit to which a minor is a party to obtain the leave of the Court with regard to any agreement or compromise that he may enter into on behalf of a minor with reference to the suit in which he acts as his next friend or guardian. That leave has under that rule to be expressly recorded in the proceedings, and sub-rule 2 provides that any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor. Very recently the nature and effect of this rule was considered by the Privy Council in *Chhaba Lal* v. *Kallu Lal*[2], and their Lordships made this observation :

"At the same time it is clear that the terms of Order 32, rule 7 were not complied with. There was no formal application by the guardian *ad litem* for the leave of the Court to his entering into the agreement for reference to arbitration, nor was any such leave formally given, or expressly recorded in the proceedings. The note on the record quoted above does not show that the Judge realised that he was dealing with the guardian-*ad-litem* of minors. The requirement in Order 32, rule 7, that the leave of the Court be expressly recorded in the proceedings was added in 1908, and Sir Thomas Strangman for the appellant says that the addition to the rule merely gave statutory effect

1. (1945) 2 M.L.J. 367 (P.C.).

2. (1946) 1 M.L.J. 339 (P.C.).

to the previous practice. Be that as it may, the rule is imperative and in their Lordships' view its terms must be strictly complied with."

Further it was pointed out relying on a ruling of the Full Bench of the Allahabad High Court in *Maniam Bibi* v. *Amna Bibi*[1], that an agreement which removes the decision of a matter in dispute from the jurisdiction of the Court and refers it to some outside party is clearly an agreement with reference to the suit and not only falls within the terms of the rule, but comes within the mischief at which the rule appears to be aimed. Their Lordships said :

"The interests of minors might well be sacrificed by an improper reference to arbitration and it is necessary that their interest be protected by the Court. If minors successfully challenge an agreement to refer as not made in compliance with sub-section (1) of rule 7, it is avoided against all parties under sub-section (2)."

These remarks, in my judgment, apply forcibly to the present case. Here also the matter was referred to a mediator, taking the case out of the hands of the Court and an adjustment seems to have been arrived at, for which, under rule 7, it was imperative to take the leave of the Court and to get it recorded in the proceedings of the suit. The only possible way of getting out of this situation would be to contend that the suit itself was no longer pending in view of the order "closed" that was passed by the Court on the 15th April, 1932. But such an order is clearly an order which cannot be deemed to amount to a disposal or dismissal of the suit. Even if it did amount to a dismissal, it has been held by the Privy Council in *Lachmi Narain Marwari* v. *Balmukund Marwari*[2], that after a preliminary decree, notwithstanding a dismissal, the suit will still be held to be pending.

The civil revision petition is dismissed with costs.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

V. H. Subramania Vadiar, Trustee of Vatakanthara Thiruvengatappan Devaswam and the representative of the said villagers .. *Appellant**

v.

Sreenivasa Vadiar, Secretary, Sree Krishna Bhajana Madom, Thiruvengatappan Devaswam .. *Respondent.*

Civil Procedure Code (V of 1908), Order 1, rule 8—Representative suit—Grant of leave to person not really interested—Variance of order at later stage—Permissibility.

Order 1, rule 8, Civil Procedure Code presupposes the existence of a right of suit in the plaintiff who instituted the suit. Where a person is wrongly granted permission to represent a body that decision is not final and can be reagitated at a later stage by the trial Court, or at any rate the order can be set aside in appeal.

V. Krishna Aiyar v. *Pachayappa Chetti*, (1924) 47 M.L.J. 540, relied on. *Gafurulli (Sayed Anwar and others)* v. *Mohiddin (Shamsuddin and others)*, A.I.R. 1932 Bom. 65, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut dated 7th October, 1944, and passed in A. S. No. 135 of 1944, preferred against the decree of the Court of the District Munsiff of Palghat in O. S. No. 67 of 1942.

C. S. Swaminathan for Appellant.

C. K. Viswanatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The two points raised in this second appeal are those set out for determination in the lower appellate Court. They are these :—

(1) Whether the Bhajana Madham in question is an institution appertaining to Thiruvengatappan Devaswom, of which the plaintiff is trustee;

(2) If not, whether the plaintiff is entitled to any of the reliefs claimed in the plaint as a representative of the villagers of Vadakanthara Village.

1. I.L.R. 1937 All. 317 (F.B.). 321 : I.L.R. 4 Pat. 61 (P.C.).
2. (1924) 47 M.L.J. 441 L.R. 51 I.A.

* S. A. No. 729 of 1945. 10th July, 1946.

Both these points were decided against the appellant in the Courts below.

The first point is one of fact. The learned advocate for the appellant criticises the judgment of the lower appellate Court and points out that some of the documents have not received sufficient consideration. He points out, for example, such a sentence as this :

"Ex. P-1 to P-6, P-8 and P-11 relied on by the plaintiff do not in any way help the plaintiff's case."

He contends that this is a very improper way of dealing with these important documents. It is to be remembered, however, that the judgment of the lower appellate Court was a concurring one. In view of the fact that the learned District Munsiff discussed the whole case very thoroughly and examined every document carefully, it was unnecessary for the lower appellate Court to repeat the arguments of the District Munsiff. I find no reason for disturbing this concurrent finding of fact.

The second point is a combined question of fact and law. The question of fact is whether the plaintiff was a villager, and the second is, assuming that he was not, did the permission granted by the trial Court to the plaintiff to represent the villagers, prevent that Court and the appellate Courts from considering the question whether he was entitled to sue ? I find no reason for not accepting the concurrent finding of the Courts below that the appellant was not a villager . Both the Courts were also of the opinion on the evidence that only the villagers had a right to manage the Bhajana Madom.

It is argued that when a Court grants permission to a person to represent a body, that decision is binding on the parties and cannot be re-agitated at any other stage of the suit or appeal. It is easy enough to see how injurious it might be to an institution if a person not entitled to represent it, possibly even inimical to it, were to obtain an order in his favour—perhaps obtained *ex parte*—to represent that institution, and upon the Court's finding that he was not entitled to represent the institution, it could not dismiss the suit on that ground and was forced to pass a decree binding on the institution, when all the persons interested in the institution were content with the management and did not wish it to be interfered with. The learned advocate for the appellant, however, relies on the decision of the Bombay High Court in *Gafuralli (Sayad Anwar and others)* v. *Mohiddin (Shamsuddin and others)*[1]. There, certain Mahomedans were appointed under Order 1, rule 8, to represent a mosque. A successor to the judge who granted the permission, after hearing the arguments for a large number of other persons interested in the mosque, who contended that the character of the plaintiff did not entitle him to present the community and that some other persons should be appointed, deleted the names of the original plaintiffs and substituted some others. It was held by the learned Judges of the Bombay High Court that this could not be done, that it was not open to a succeeding Subordinate Judge to nullify an order passed by his predecessor, and that sub-rule (2) of that rule provided ample opportunity to the others to get themselves impleaded as parties. Even that decision does not however say that it is not open to the appellate Court to hold that the trial Court ought not to have permitted the plaintiffs to file the suit. Moreover, the dispute there was between persons undoubtedly entitled to enjoy the institution as to who was the best qualified to represent it. No harm was done to anybody by allowing the plaintiffs to represent the institution ; because the others equally interested in the institution could get themselves impleaded. A different situation arises when the person who brings the suit is not entitled to represent the community at all. Venkatasubba Rao, J., in *V. Krishna Aiyar* v. *Pachayappa Chetti and others*[2], said :

"Order 1, rule 8, Civil Procedure Code presupposes the existence of a right of suit in the plaintiff who instituted the suit ; and the community of interest between him and others of the class is the prerequisite necessary to enable him to represent that class. If the plaintiff turns out not to be a

1. A.I.R. 1932 Bom. 65. 2. (1924) 47 M.L.J. 540.

member of the class on whose behalf he professed to institute the suit, the suit is not a representative suit and no member of the class is constructively a party to it."

With respect, I am in entire agreement with the learned Judge.

It may be mentioned that the learned Munsiff did not attempt to decide in the application under Order 1, rule 8, whether the plaintiff was a resident of the village and was entitled to sue on behalf of the community. What he said was this :

"The permission to file a suit in a representative capacity is sought only to meet the contention that that this Bhajana Madom does not pertain to the Devaswom. So the objection based on section 73 of the H. R. E. Act cannot stand. The permission prayed for is granted."

The question whether the plaintiff was a villager and therefore entitled to represent the Bhajana Madom, he made an issue in the suit and no objection was taken to the framing of such an issue by the plaintiff.

I cannot therefore agree with the learned advocate for the petitioner that the question could not be agitated in the trial Court. Even if it could not be agitated there, it could be done in appeal. It is not possible to believe that there is no remedy against a wrong order passed by a trial Court under Order 1, rule 8.

The appeal fails, and is accordingly dismissed with costs.

B.V.V. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the Supreme Court of the Island of Ceylon.)

PRESENT :—LORD PORTER, LORD DU PARCQ AND SIR JOHN BEAUMONT.

V. S. Subbiah Nadar, Administrator of Estate of T. P. Sokkalal Ram Sait .. *Appellant**

v.

E. P. Kumaraval Nadar (deceased) and others .. *Respondents.*

Trade Mark—Passing off—Colourable imitation—Defence of concurrent user—Burden of proof—Registration—Evidentiary value.

Where it is found that the defendants originally copied the trade mark of the plaintiffs, the finding casts a heavy burden on the defendants to show that any concurrent user on their part was honest. Evidence of long concurrent user to the knowledge of the plaintiff in such circumstances that the plaintiff must be deemed to have acquiesced in such user and waived any right to object to it might suffice. Mere registration of a trade mark, though it proves that such mark was in existence at the time of registration does not prove user of the mark.

Appeal from a judgment of the Supreme Court of Ceylon dated 19th June, 1939, reversing the judgment of the District Court of Colombo.

D. N. Pritt, L.M.D. De Silva and *Stephen Chapman* for Appellant.

James Mould for Respondents.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal by special leave from a judgment and decree dated 19th June, 1939, of the Supreme Court of the Island of Ceylon which reversed a judgment and decree dated 17th June, 1938, of the District Court of Colombo.

The suit out of which this appeal arises was brought on the 11th November, 1936, in the District Court of Colombo, by T. P. Sokkalal Ram Sait (who is hereinafter called the plaintiff) against E. P. Kumaraval Nadar, who was defendant No. 1, his partners the respondents Nos. 2-4 who were defendants 2-4, and respondent No. 5, who was defendant No. 5, and was the manager in Ceylon of the other defendants. The plaintiff died pending the appeal to His Majesty in Council, and the appellant, as administrator of his estate, has been brought on record as appellant. The said E. P. Kumaraval Nadar also died pending the appeal, and his widow and children have been substituted for him as respondent No. 1.

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* P. C. Appeal No. 29 of 1940. 11th April, 1946.

By his plaint, the plaintiff alleged that he was the manufacturer of beedies (a small and cheap type of cigarette) and carried on business in Colombo; that in connection with such business he was the proprietor of a trade-mark consisting of the device of a portrait of the plaintiff in a turban surrounded by rays of light and other distinctive features, and that the trade-mark was registered in the Register of Trade-marks in Ceylon under No. 4919 in class 45 in respect of beedi on the 15th June, 1930; that the plaintiff was also the proprietor of a trade-mark consisting of the device of a circle containing the portrait of the plaintiff in a turban and that the said trade-mark was registered in the said Register of Trade-marks under No. 5929 in the said class on the 26th September, 1934; that the plaintiff had extensively used the said trade-marks on packets of beedies manufactured and sold by him since the years 1926 and 1934 respectively; that by reason of the said user the plaintiff's beedies marked with the said trade-mark and figures had become known to purchasers and intending purchasers as "Photo Mark beedies," "Ram Sait beedies" and "Sokkalal beedies," and that in the beedie trade, "Photo Mark beedies," "Ram Sait beedies" and "Sokkalal beedies" meant the beedies made and sold by the plaintiff; that the defendants had infringed the plaintiff's said trade-marks and had advertised and sold at Colombo beedies not of the plaintiff's manufacture as "Photo Mark beedies." The plaintiff claimed an injunction to restrain such infringement and passing-off.

The defendants in their answers denied infringement and passing-off, and further pleaded that they had used the marks complained of by the plaintiff in connection with their trade in beedies from a date anterior to either the date of user or the date of registration of the marks Nos. 4919 and 5929 by the plaintiff.

On the 8th February, 1937, the plaintiff with the leave of the Court amended his plaint by alleging user of the trade-mark No. 4919 from the year 1915 in place of the year 1926, and on the 30th June, 1937, the plaint was further amended by leave by substituting the year 1912 for the year 1915. In view of these amendments which put back from 1926 to 1912 the alleged date of the first user by the plaintiff of his trade-mark No. 4919, the defendants on the 1st July, 1937, obtained leave to amend their answer by praying that the first four defendants be declared entitled to have their trade-marks registered in the Register of Trade-marks and that the Registrar of Trade-marks be directed to register the same in the Register of trade-marks. This amendment enabled the defendants to raise the issue of honest concurrent user, which will be dealt with later in this judgment.

At the commencement of the trial, the position with regard to registration as found by the trial judge, whose finding on this point has not been challenged, was as follows. The plaintiff had registered in Ceylon his trade-mark No. 4919 on the 18th January, 1930, and his trade-mark No. 5929 on the 2nd March, 1934. (These were in fact the dates of application for registration.) On the 6th February, 1934, the defendants made an application No. 5903 to register a trade-mark containing a portrait of E. P. Kumaraval Nadar in a dress very similar to that worn by the plaintiff in the portraits on his trade-marks, surrounded by features closely resembling those surrounding the plaintiff's portrait in Trade-mark No. 4919. The Registrar refused registration on the ground that the mark so closely resembled the plaintiff' smark, as to be calculated to deceive, and the application was withdrawn by the defendants without prejudice to their rights on the 29th June, 1936. Subsequently, the defendants made application to register a label in connection with their "Falcon" brand, which contained a portrait said to be a portrait of one of the defendants. On objection being taken by the plaintiff, the defendants undertook to delete the portion of the mark which contained a portrait in a round label, and to pay any costs, which might be directed by the Registrar-General to be paid to the plainitiff. A further application was made by the defendants on the 11th January, 1936, to register another trade-mark, but on opposition from the plaintiff the matter was not proceeded with. On 1st July, 1937, during the pendency of this action the defendants made applications Nos. 6778 (Ex. D-69) 6779 (Ex.-D 70) and 6780 (Ex.-D 71) for registration of marks containing portraits

and other features alleged to resemble those in the trade-marks of the plaintiff. These are the marks which are alleged to be an infringement of the plaintiff's two trade-marks. In 1915 the defendants registered their trade-mark with the Chamber of Commerce in Madras, and in 1917 the plaintiff registered his trade-mark with the same Chamber of Commerce. In 1925 the defendants registered their trade-mark with the Chamber of Commerce in Calcutta.

At the trial the learned judge raised twenty issues, many of which were sub-divided, but only a few of such issues are relevant on this appeal. Shortly summarised, the relevant issues are: (1) Whether the plaintiff's trade-marks Nos. 4919 and 5929 have been infringed by the defendants; (2) Whether the plaintiff is entitled to restrain the defendants from selling their beedies under the designation of "Photo Mark beedies"; (3) Whether the defendants used their marks from a date anterior to either the date of user by the plaintiff or the registration of the marks 4919 and 5929, so as to entitle them to the use of their said marks; (4) Whether there has been an honest concurrent user by the defendants of their said marks so as to entitle the first four defendants to procure such marks to be registered in Ceylon. The learned judge also raised an issue as to whether registration of the plaintiff's said trade-marks entitled them to prevent the user by the defendants of the features and devices surrounding the portraits of the plaintiff, and he answered that issue in the affirmative. In their Lordships' view, this issue raised a purely hypothetical question which the learned judge ought not to have raised or attempted to answer. The question of infringement must be answered in relation to the plaintiff's trade-marks as a whole, and not to particular parts of them. There is no evidence that the defendants have made use of a mark containing the features surrounding the plaintiff's portrait either without any portrait, or with a portrait in no way resembling that of the plaintiff, and the question whether such a mark if and when adopted by the defendants will involve infringement of the plaintiff's marks does not arise.

The learned judge held that the defendants had infringed the plaintiff's trade-marks, that there had been no anterior user as alleged by the defendants and no honest concurrent user, and that the defendants had passed off beedies not of the plaintiff's manufacture under the description of "Photo Mark beedies," and he granted the injunctions asked for. On appeal the Supreme Court, whilst not disputing that the defendants' marks so closely resembled the plaintiff's registered trade-marks as to be calculated to deceive, considered that the defendants had proved anterior user as alleged by them and that they had also proved honest concurrent user, though it was unnecessary to rely upon that. The Court therefore allowed the appeal, dismissed the plaintiff's action, awarded the defendants Rs. 300 damages in respect of an interim injunction which had been granted to the plaintiff, and directed the Registrar to proceed with the applications to register the defendants' marks regardless of the opposition of the plaintiff.

There being no evidence of actual deception the issue of infringement, which is the first issue to be decided, turns primarily upon a comparison of the trade-marks registered by the plaintiff with those used and sought to be registered by the defendants as aforesaid. The similarities between the rival marks were summarised by Mr. Justice Wijeyewardene in his judgment in the Supreme Court in these terms:

"The trade-mark No. 4919 . . . contains in the centre a portrait of the plaintiff, who is a man of South India, wearing a North Indian turban and an open coat without a tie. There is a halo serving as a background. On either side of the figure is a pillar above which is draped a curtain. At each of the four corners of the coloured design surrounding the portrait, the pillars and the curtain, is a plane, and between each set of planes is a figure like an elongated dumb-bell. The outstanding colours used to complete the picture are black and yellow. On all sides of the Portrait there are legends in Marathi and Tamil.

"The trade-mark No. 5929 . . . consists of the device of a circle containing a portrait as depicted in trade-mark 4919.

"The trade-mark No. 5903 of the defendants contains in the centre a portrait of the first defendant, who is himself a man of South India, wearing a North Indian turban and an open coat without a tie. There are also the halo serving as a background, the pillars, the drapery, the planes and the elongated dumb-bells placed in the same position as in the plaintiff's trade-mark 4919. There are also some

legends on all sides of the portrait in Marathi and Tamil. The predominating colours are black and yellow."

The learned trial Judge had also noted another point of similarity, namely, that the defendants' mark contained in Tamil characters words importing that E. P. Kumaraval was the true or original Sait, whilst on the plaintiff's mark No. 5929 were the words "Ram Sait Beedie" both in English and Tamil characters. Their Lordships do not attach significance to the similarity in colours between the mark of the plaintiff and the defendants since they understand that the labels were issued in a large variety of colours. But the other points of similarity are very marked. There are, of course, minor points of difference in the devices or features surrounding the portraits, but the only substantial difference between the marks is that the plaintiff's marks contain a portrait of the plaintiff, whilst the defendants' marks contain a portrait of E. P. Kumaraval Nadar. It is not disputed that the plaintiff has no monopoly in the right to display a portrait as part of a trade-mark. The defendants have a perfect right to display a portrait of one of themselves on their own mark so long as their portrait itself or their portrait together with the surrounding devices does not so closely resemble the plaintiff's portrait and devices as to lead to confusion. The defendants' portrait is of E. P. Kumaraval Nadar in a Marathi dress and head-dress similar to the dress and head-dress in the plaintiff's photo and surrounded by a series of almost identical features. It is in evidence that most of the people who purchase beedies are illiterate and are unlikely to make a close examination of labels on the beedies which they purchase. Their Lordships have no hesitation in holding that the general effect on the mind of anybody dealing in beedies would be to confuse the beedies sold under the marks and labels of the defendants with those sold under the plaintiff's trade-mark, and both Courts in Ceylon appear to have been of that view. In their Lordships' opinion the marks are plainly calculated to lead to confusion and deception and the similarities are so close as to make it impossible to suppose that such marks were devised independently of each other. In the absence of any evidence of a common origin, the conclusion must be that one party copied the mark of the other. The evidence on record shows that the plaintiff's case was that he left his native place of Mukkudal in the Tinnevelly District in the Madras Presidency in his 14th year and went to Bombay to learn the manufacture of beedies with an uncle. He remained in Bombay for six years and then returned to Mukkudal where he commenced the manufacture of beedies. He first adopted the labels with photograph in 1913, the design being made by a man in Madras and the labels being printed in Bombay. On his return from Bombay he adopted the names of Sokkadal Ram Sait, and he adopted the dress and head-dress shown in his registered trade-marks as a result of his sojourn in Bombay. On the other hand the defendants, who also manufacture beedies in Mukkadal, have offered no explanation of the circumstances in which they adopted their device, and particularly why, though E. P. Kumaraval Nadar was a man of South India, he chose to display a portrait of himself in Marathi dress and head-dress closely resembling that in the plaintiff's photos; nor why he referred to himself as the only original Sait, when Sait was not his name, though it was a name adopted by the plaintiff.

The only conclusion their Lordships can come to on the evidence is that the defendants copied the design of the plaintiff.

The issues which next arise for consideration are those of anterior user, and honest concurrent user, by the defendants, and on these issues the burden is upon the defendants.

In considering these issues it is necessary to notice the relevant provisions of the Trade-marks Ordinance dated 1st January, 1927, being Chapter 121 of the Legislative Enactments of Ceylon. Section 9 of the said Ordinance provides:

"It shall not be lawful to register as a trade-mark or part of a trade-mark any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of Justice."

Section 19 provides:

"In case of honest concurrent user or of other special circumstances which in the opinion of the Court or Registrar make it proper so to do, the Court or Registrar may permit the registration of the same trade-mark, or of nearly identical trade-marks, for the same goods or description of goods by more than one proprietor, subject to such conditions and limitations, if any, as to mode or place of user or otherwise as the Court or Registrar may think it right to impose."

Sections 38 provides :

"Subject to the provisions of section 40 of this Ordinance, and to any limitations and conditions entered upon the register, the registration of a person as proprietor of a trade-mark shall, if valid give to such person the exclusive right to the use of such trade-mark upon or in connection with the goods in respect of which it is registered."

Section 40 provides :

"In all legal proceedings relating to a registered trade-mark . . . . the original registration of such trade-mark shall, after the expiration of 7 years from the date of such original registration . . . . . be taken to be valid in all respects unless such original registration was obtained by fraud, or unless the trade-mark offends against the provisions of section 9 of this Ordinance : Provided that nothing in this Ordinnace shall entitle the proprietor of a registered trade-mark to interfere with or restrain the user by any person of a similar trade-mark upon or in connection with goods upon or in connection with which such person has, by himself or by his predecessors in business, continually used such trade-mark from a date anterior to the user or registration, whichever is the earlier, of the first-mentioned trade-mark, by the proprietor thereof or his predecessors in business or to object (on such user being proved) to such person being put upon the register for such similar trade-mark in respect of such goods under the provisions of section 19 of this Ordinance."

Upon these issues a large number of witnesses were called on behalf both of the plaintiff and the defendants, and on the whole the learned trial Judge accepted the evidence on behalf of the plaintiff and disbelieved that given on behalf of the defendants. The Supreme Court differed from the learned Judge on his appreciation of the evidence, and the conclusion which it reached on the issue of anterior user was that the defendants had used continuously in Ceylon the device on their trade-mark from January, 1916, and that the plaintiff had made no user of the device on his trade-marks prior to that date. The learned Judges of the Supreme Court recognised the danger of differing from the trial Judge who had seen the witnesses on questions of fact, but they considered that the trial Judge had overlooked, or at any rate failed to give due effect to, the fact that the defendants had registered their mark in Madras in the year 1915. At the material time, and indeed down to the trial of this suit, there was no statutory law in India relating to the registration of trade-marks. But parties desirous of registering a trade-mark could do so in the Chambers of Commerce in certain towns including Madras. It is not disputed that the defendants had registered in the Chamber of Commerce in Madras a mark very similar to the one in dispute in this suit in the year 1915. Such registration conferred no legal right on the defendants, but the Supreme Court thought it a clear inference to draw therefrom that the mark had been used by the defendants from about the time of such registration. Their Lordships are not prepared to attach to such registration the importance assigned to it by the Judges of the Supreme Court. The registration no doubt proves that the defendants' mark was in existence in the year 1915, but it does not prove user of the mark even in India, and much less in Ceylon, which is the only place in which user is relevant. The document on which the Supreme Court relied for its finding that the defendants' mark had been used continuously in Ceylon from January 1916, is Exhibit D-2, which is an extract from the defendants' account books and which shows that from the 3rd January, 1916, for the rest of that year a considerable number of beedies were sent by the defendants to a dealer named T. M. K. Mohamed Kasim in Colombo. This Exhibit, however, does not mention the brands of beedies sent. The oral evidence given on behalf of the defendants was to the effect that the only brand of beedies which they imported into Ceylon between 1916 and 1930 was the Kumaraval brand, though at the time they dealt in other brands in India, and that the Kumaraval brand was always sold under a label with a portrait of E. P. Kumaraval Nadar in the form used on the mark which they were seeking to register. This evidence was contradicted by evidence given on behalf of the plaintiff, was rejected by the learned District Judge, and was supported by no documentary evidence. The first document relating to Ceylon which mentions

Kumaraval beedies is Exhibit D. 180, a postcard from Kandy dated 27th September, 1926, addressed to the defendants' firm at Mukkudal ordering one parcel of Kumaraval beedies, but there is no evidence that this was supplied under the disputed marks. There is no document on record which shows that before about 1930 any beedies of the defendants were sold under the disputed mark, and it is very difficult to suppose that no such documentary evidence exists, if in fact this mark was in constant use from 1916 onwards. The labels with the portrait of E. P. Kumaraval Nadar must have been printed somewhere, but no orders, invoices or receipts relating to such printing are produced, nor any old copies of the labels. The defendants' evidence was that considerable sums were spent by them in advertisement, but no advertisement was put in evidence. It is strange too if the defendants had been selling their beedies under this trade-mark since 1916 that they took no step to oppose the registration by the plaintiff in 1930 and 1934 of his very similar marks. It is to be noticed also that when on the 17th December, 1935, the plaintiff by his proctor wrote to the defendants' firm a letter, Exhibit D. 204, complaining that they were infringing the plaintiff's trade marks, Nos. 4919 and 5929, the defendants in their reply of the 27th December, 1935, Exhibit D.205, denied that they were selling beedies under any mark which resembled any of the plaintiff's marks, but did not suggest that for many years past they had been using the mark complained of. Moreover, even if the defendants' mark was first used in Ceylon in 1916, there is no evidence of continuous user between that date and about 1930. On a careful review of the whole of the evidence, their Lordships agree with the finding of the trial Judge that the defendants have not proved user of their mark prior to the user of the plaintiff's mark.

On the issue of honest concurrent user the evidence is to a great extent the same as that in relation to the issue of anterior user. It is not disputed that from about 1928 or 1930, not only the defendants but other traders in Ceylon have been using marks resembling in a greater or less degree the trade-marks of the plaintiff, and the evidence shows that the plaintiff in a good many instances took steps to prevent such user. The opposition of the plaintiff to the efforts of the defendants to register their marks has already been noticed. The finding of their Lordships that the defendants originally copied the trade-mark of the plaintiff casts a heavy burden on the defendants to show that any concurrent user on their part was honest. Evidence of long concurrent user to the knowledge of the plaintiff in such circumstances that the plaintiff must be deemed to have acquiesced in such user and waived any right to object to it might suffice, but there is no such evidence.

That leaves only the issue whether the defendants have sold or dealt in their beedies by the description of "Photo" or "Photo Mark" beedies, and whether the plaintiff can restrain such action. On this issue their Lordships agree with the Supreme Court in thinking that the plaintiff failed. There is a certain amount of evidence that the plaintiff's beedies are asked for as "Photo" or "Photo Mark" beedies, though they are also asked for as "Sokkalal" or "Ram Sait" beedies, descriptions which it is not suggested are applied to the defendants' goods. There is no evidence whatever that any person asking for "Photo" or "Photo Mark" beedies has been given the defendants' beedies and has subsequently complained because he did not get the beedies of the plaintiff. The evidence falls far short of showing that the description "Photo" or "Photo Mark" beedies has come to be regarded in Ceylon as denoting exclusively the beedies of the plaintiff.

In the result their Lordships think that the appellant is entitled to an injunction to restrain infringement of his two trade-marks, but is not entitled to an injunction to restrain passing off. With regard to costs, the correct order would have been to give the plaintiff the general costs of the action, and to give the defendants the costs of the issues on which they succeeded. The costs would seem not to have been greatly increased by the issue on which the defendants succeeded, since the same witnesses dealt with all the issues, but no doubt the proceedings have been somewhat prolonged by the raising of such issues. Their Lordships think it impracticable to re-open the taxation of costs and they propose therefore to allow to the defendants some relief against the general costs of the action.

Their Lordships therefore will humbly advise His Majesty that this appeal be allowed and that the order of the Supreme Court dated 19th June, 1939, and the order of the District Judge dated 17th June, 1938, be set aside; that the appellant is entitled to an injunction to restrain the respondents, their servants and agents from infringing the appellant's trade-marks Nos. 4919 and 5929 by the marks of the respondents sought to be registered under applications Nos. 6778, 6779 and 6780 dated 1st July, 1937, being Exhibits D.69, D.70, D. 71 or by the use of any other mark or device being a colourable imitation of the appellant's said trade-marks or either of them and that the respondents be ordered to deliver to the appellant upon oath or affirmation all labels, bills, invoices, letters, forms or other documents in the possession or under the control of the respondents bearing the said marks sought to be registered by the respondents or any of them for erasure or cancellation.

The respondents must pay to the appellant two-thirds of the costs of the appellant and the plaintiff of the trial, of the appeal to the Supreme Court and of the appeal to His Majesty in Council.

H.J.U./K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYER.

T. Umar Pulavar .. *Appellant**

v.

Dawood Rowther and others .. *Respondents.*

Transfer of Property Act (IV of 1882), Section 111 (g)—Application of the section to agricultural leases.

Section 111 (g) of the Act embodies a principle of justice, equity and good conscience and though not made applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages, in the absence of special reasons it applies to agricultural leases even more forcefully than to non-agricultural leases and a proper notice to quit by the landlord to the tenant is necessary before instituting a suit.

Appeal against the decree of the District Court, Madura, in A. S. No. 262 of 1944, preferred against the decree of the Court of the District Munsiff of Melur in O. S. No. 168 of 1943.

K. S. Rajagopalachariar for Appellant.

T. L. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—A new point not raised in the Courts below is now taken on behalf of the plaintiff-appellant. He says that in applying section 111 (g) of the Transfer of Property Act to the facts of this case and holding that even where forfeiture has been incurred on the ground of a denial of the landlord's title a notice in writing determining the lease is necessary, the lower Courts overlooked the fact that this was an agricultural lease which is exempt from the operation of the provisions of Chapter V of the Transfer of Property Act. Under section 111 (g) as it originally stood, the landlord was bound in the case of such a forfeiture to show by some act of his an intention to determine the lease. The question often arose whether section 111 (g) in that form was applicable to agricultural leases and the preponderance of authority was in favour of the view that though under section 117 of the Act agricultural leases were excluded from the scope of the provisions of the particular chapter, still the principle embodied in the section could be applied to such leases also as a rule of justice, equity and good conscience. One of the points that the Courts were called upon to consider in this connection on the wording of the section as it originally stood was whether the act to be done by the lessor to show his intention to determine the lease was an act which had to precede the institution of the suit or whether the launching of the suit could itself be regarded

* Second Appeal No. 2098 of 1945. 29th March, 1946.

as such an act. Following the rule of English Law before the enactment of section 146 of the Law of Property Act, 1925, it was held in two decisions that in cases of tenancies not governed by the Act, either because they came into existence before the Act, or because they were in the nature of agricultural leases, the institution of the suit was itself enough. *Padmanabhayya* v. *Ranga*[1], was one such case where the lease had been executed long before the Transfer of Property Act came into force, and it points out that the decision in *Venkataramana Bhatta* v. *Gundaraya*[2], to the effect that some act independent of the institution of the suit was necessary even with reference to a lease executed before the Transfer of Property Act was probably due to the circumstance that the attention of the Court was not drawn to the fact that the lease in that case was prior to the Transfer of Property Act. Another case on the same line is that reported in *Korapalu* v. *Narayanan*[3], where the lease came into existence after the Transfer of Property Act but was an agricultural lease. Sadasiva Aiyar, J., with whom Tyabji, J., concurred, observed that no act was at all necessary on the part of the plaintiff to take advantage (as regards his share of the land) of the forfeiture clause in the lease deed. It is for the purpose of attenuating the rigour of the law as thus interpreted and applied in such decisions that section 111 (*g*) was amended in 1929 and it was made clear that even in the case of forfeiture by denial of the landlord's title a notice in writing determining the lease must be given. The principle so embodied in the section as a result of this amendment becomes, so to say, a principle of justice, equity and good conscience which must be held to govern even agricultural leases, though under section 117 of the Act they are exempt from the operation of the chapter. To hold that with reference to agricultural leases previous notice determining the tenancy is not necessary is to ignore the policy of the Act as disclosed by the amendment which was intended to afford all tenants greater protection than what was afforded by the decisions which interpreted section 111 (*g*) as it originally stood. It is reasonably clear that if notice is necessary with reference to non-agricultural leases it is still more necessary in the case of agricultural leases where larger interests are at stake, generally speaking, and where in the absence of a proper notice to quit the right to the standing crops raised by the tenants might itself become a subject of dispute as between them and the landlord. The following observations of Sir John Wallis, C.J., in *Krishna Shetti* v. *Gilbert Pinto*[4], can be usefully quoted in this connection :

> "The fact that agricultural leases such as this one are excepted from the operation of Sections 105 to 116, Transfer of Property Act does not, in my opinion affect the present question. The Act was framed by eminent English lawyers to reproduce the rules of English law, in so far as they are of general application and rest on principle as well as authority, and its provisions are in my opinion binding on us as rules of justice, equity and good conscience, when we have to deal with agricultural leases in the absence of any special reason for not applying them. The legislature wisely in my opinion, if I may say so, has refrained from making these sections applicable *proprio vigore* to agricultural leases for fear of unnecessarily interfering with settled usages which it is undesirable to disturb. But in the absence of special reasons, there is no ground for applying a different rule in the cases of agricultural leases and there are many decisions to that effect."

Once we reach the position that section 111 (*g*) as amended embodies a principle of justice, equity and good conscience, it follows that it should apply to agricultural leases as well even more forcefully perhaps than to non-agricultural leases.

I hold therefore that the lower Courts have rightly decided that the plaintiff's suit must fail in the absence of a proper notice to quit and dismiss this second appeal with costs.

Leave to appeal is refused.

V.P.S. *Appeal dismissed.*

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1. (1910) 20 M.L.J. 930 : I.L.R. 34 Mad. 445.
2. (1908) I.L.R. 31 Mad. 403.
3. (1913) 25 M.L.J. 315 : I.L.R. 38 Mad. 161.
4. (1919) 36 M.L.J. 367 : I.L.R. 42 Mad. 654 at page 660.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Mylavaram Nagayya .. *Petitioner**

v.

The Penukonda Co-operative Town Bank, Ltd., by its President .. *Respondent.*

Limitation Act (IX of 1908), Article 96—Applicability—Mistake in sale held in execution—Claim by auction purchaser for return of the purchase money—Limitation—Starting point.

In execution of an award in favour of a co-operative society a house was brought to sale. A reversioner of the last male holder of the property put in a claim petition which was dismissed. He filed a claim suit and succeeded in it on 31st March, 1938. An appeal was preferred to the District Court which was dismissed on 4th April, 1941, and the widow of the last male holder obtained possession from the auction purchaser on 7th April, 1943. The auction purchaser filed a suit on 23rd January, 1944, for the return of the purchase money. On a question of limitation,

Held, (i) Article 96 and not Article 97 of the Limitation Act applied to the case.

Jayanthi Rudrayya v. *Jayanthi Subbarayappa*, A.I.R. 1941 Mad. 742, relied on.

(ii) Time began to run from 31st March, 1938, the date when the decree of the trial Court was passed and not from 4th April, 1941, the date of the appellate Court decree. When the first Court passed its decree the plaintiff was informed and had knowledge that a mistake had been made. Although there was still the possibility that the appellate Court might reverse the decree of the first Court, yet the plaintiff continued to have knowledge and since the appeal was dismissed, the plaintiff's knowledge continued uninterrupted from the date of the decree of the trial Court.

Juscurn Boid v. *Pirthichand Lal Choudhury*, (1918) 36 M.L.J. 557 : L.R. 46 I.A. 52 : I.L.R. 46 Cal. 670 (P.C.); *Nadukandas Pakuran* v. *Kayattil Kandan Kutty*, (1922) M.W.N. 561 and *Martand Mahadev* v. *Dhondo Moreshwar*, (1920) I.L.R. 45 Bom. 582, referred to.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Penukonda, dated 28th October, 1944, and passed in S. C. No. 25 of 1944.

V. S. Narasimhachari for Petitioner.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondent.

The Court delivered the following

JUDGMENT.—A member of a Co-operative Society, by name Narasimha Sastri borrowed a sum of money from the Society and purported to mortgage to it the house in which he was living. In fact, he was a tenant of that house and had no right whatsoever ; but the fraud he played on the Society was not detected and his mortgage was accepted. When he did not pay the debt, an application was filed before the Deputy Registrar of Co-operative Societies in Claim No. 7/33-34 for the amount due. An award was passed and in due course E. P. No. 693 of 1933-34 was filed by the Co-operative Society and the property brought to sale. The reversioner of the last male owner of the house during the course of these proceedings put in a claim petition. His petition was dismissed ; but he filed a claim suit, O. S. No. 41 of 1937, in the Court of the District Munsiff of Penukonda and succeeded on 31st March, 1938. An appeal was preferred to the District Court which was dismissed on 4th April, 1941. The widow of the last male holder on 22nd March, 1943, issued a notice to the plaintiff to give her possession ; and in accordance with that request possession was given to her by the plaintiff on 7th April, 1943. Nine months later, on 23rd January, 1944, the plaintiff filed S. C. No. 25 of 1944, out of which this petition arises, for the return of the purchase money. The suit was dismissed on the ground that it was barred by time, being more than three years from the date on which he knew that a mistake had been made in selling him the house that he had purchased in Court auction.

The lower Court applied Article 96 of the Limitation Act, which relates to a relief based on the ground of mistake. The time for filing such a suit is three years from the date when the mistake becomes known to the plaintiff. The learned advocate for the petitioner argues here, as he did in the lower Court, that the proper Article to apply is not Article 96 but Article 97, the suit being, he says, one

* C. R. P. No. 423 of 1945. 29th July, 1946.

for money paid upon existing consideration which afterwards failed. The learned advocate has referred to many decisions—which it is unnecessary to quote here—where sales were not void *ab initio*, because they were good until avoided by some other person, for example, by a reversioner disputing an alienation made by a widow. In such cases, it is obvious that the sale was originally good and the consideration failed only when a person entitled to avoid the transaction actually did so. The only decision in the petitioner's favour which related to a *bona fide* sale—such as is the case here—in which a mistake was made by all concerned is *Narsing Shivbakas* v. *Pachu Rambakas*[1]. The learned Judges who decided that case did not consider the applicability of Article 96. They were concerned with the question whether Article 97 applied or Article 62; and as between these two Articles they had no doubt that Article 97 was the appropriate Article. The learned advocate for the petitioner relies on a dictum of the learned Judges that possession is all the consideration that the vendee is entitled to. With great respect, I cannot agree that when a person pays money for property, the only thing to which he is entitled is possession. He certainly has a right to a good title also, and if he is not given a good title as well as possession the consideration fails. All the decisions bearing on this question were very carefully considered by King, J., in *Jayanthi Rudrayya* v. *Jayanthi Subbarayappa*[2] and it is unnecessary for me to repeat his arguments, with which I am in complete agreement. He had to consider the very question that is before me here, whether Article 96 applied or Article 97; and he gave reasons based on earlier authorities that Article 96 and not Article 97 applied. That case is sought to be distinguished by Mr. Narasimhachari on the ground that no possession was there given, whereas in the present case possession was given. But the possession that the petitioner got was from a man who, although in possession himself, knew that he had no title to the property whatsoever. When a person who knows he has no title puts another person into possession he is not giving him anything at all as consideration for the money paid. I am unable, therefore, to draw any distinction between this case and *Jayanthi Rudrayya* v. *Jayanthi Subbarayappa*[2].

Another question that arises in this petition is whether time began to run from 31st March, 1938, the date when the decree of the trial Court was passed, or 4th April, 1941, the date of the appellate Court decree. The learned advocate for the petitioner very reasonably argued that the matter was uncertain at the time when the first decree was passed, because there was always the possibility that that decision might be reversed in appeal. Unfortunately for the petitioner, their Lordships of the Privy Council in *Juscurn Boid* v. *Pirthichand Lal Chowdhury*[3], in dealing with a question of failure of consideration, had to consider whether consideration must be deemed to have failed when the trial Court found that there was no consideration or whether it failed only when the appellate Court determined the matter. Their Lordships said:

> "Both Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal."

This decision was followed in *Nadukandee Pakuran* v. *Kuyattil Kandan Kutty*[4]. The learned advocate for the petitioner seeks to distinguish those cases from the one now under consideration by pointing out that we are not here concerned with the question of failure of consideration, but with the condition of the plaintiff's mind. It is argued, not without reason, that the petitioner could not have known at the date of the trial Court's decree that a mistake had been made; because there was a possibility that the appellate Court might hold that no mistake had been made.

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1. (1913) I.L.R. 37 Bom. 538.
2. A.I.R. 1941 Mad. 742.
3. (1918) 36 M.L.J. 557: L.R. 46 I.A. 52: I.L.R. 46 Cal. 670 (P.C.).
4. (1922) M.W.N. 561.

This very question was considered in *Martand Mahadev* v. *Dhondo Moreshwar*[1]. Although that case was rather different from the Privy Council case, in that the Court was considering a question of mistake and not failure of consideration, yet the learned Judges followed the Privy Council decision, saying :

"Here the plaintiffs' suit was dismissed and they then discovered by the decision of the Court that the mortgage had been paid off. It was open to them of course to appeal and to endeavour to get the decision of the first Court reversed . . . . But it seems to me quite clear that the discovery of the mistake, dated certainly from not later than the first Court's decree and time then began to run against the plaintiffs."

Applying the reasoning of the above cases, it would therefore seem that when the first Court passed its decree, the plaintiff was informed and had knowledge that a mistake had been made. Although there was still the possibility that the appellate Court might reverse the decree of the first Court, yet the plaintiff continued to have knowledge and, since the appeal was dismissed, the plaintiff's knowledge continued uninterrupted from the date of the decree of the trial Court.

The petition is dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Gedela Atchayya and others .. *Appellants**

v.

Koppisetti Appalaraju and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 20, rule 12 (Madras)—Suit to recover possession and for damages —No claim for future mesne profits—Decree-holders' subsequent application for ascertainment of future mesne profits—Court has no jurisdiction to direct ascertainment of future mesne profits when decree is silent—Madras Debt Conciliation Act (XI of 1936), section 10 (2)—Whether liability for future mesne profits can be a "debt".

In a suit to recover possession of a site from defendants 1 to 3, to have a street restored and for payment of a certain amount as damages, the decree in favour of plaintiffs in 1931 directed defendants 1 to 3 to remove the enclosure round the site, to put plaintiffs in possession of it and to pay plaintiffs a certain amount as damages for the year 1928. There was no claim for mesne profits subsequent to 1928 and the decree was silent about it. The decree-holders applied in 1943 under Order 20, rule 12, Civil Procedure Code, for the ascertainment of subsequent mesne profits and for a decree regarding the amount so ascertained. The first defendant alone resisted the application on the grounds that (*a*) the liability had become discharged under Madras Debt Conciliation Act, 1936, section 10 (2) and (*b*) the application under Order 20, rule 12, Civil Procedure Code, was not maintainable and was misconceived in that the decree never alluded to any future mesne profits.

Held, (1) that the liability for future mesne profits not having been adjudicated upon by any decision of Court and the amount itself not having been ascertained, it could not be described as a 'debt' within the meaning of the Madras Debt Conciliation Act.

(2) That the Court had no jurisdiction to allow the application under Order 20, rule 12, Civil Procedure Code, since mesne profits have to be ascertained at the stage of the suit itself and there having been no such claim and the decree having been silent, the relief should be deemed to have been refused.

Muthayya Kone v. *Rakappan Ambalam*, (1935) 70 M.L.J. 87, distinguished.

Appeal against the order of the Court of the Subordinate Judge of Cocanada, dated 31st January, 1945, and made in A. S. No. 205 of 1944 (I.A. No. 221 of 1943 in O. S. No. 204 of 1929, District Munsiff's Court of Peddapuram).

M. Appa Rao for Appellants.

C. Rama Rao for Respondents.

The Court made the following

ORDER.—Original Suit No. 204 of 1929 was a suit to recover possession of a site from defendants 1 to 3, to have a street restored, and for the payment of a sum of Rs. 50 as damages for the year 1928. The plaint was presented on 13th July, 1929. There was a decree in favour of the plaintiffs on 17th August, 1931, directing defendants 1 to 3 to remove the enclosure around the site that they had put up and to put the plaintiffs in possession of it so that it might be available for communal

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1. (1920) I.L.R. 45 Bom. 582.

*A.A.O. No. 512 of 1945. 14th March, 1946.

user of the plaintiffs and the defendants; the street was to be restored to its original condition, and defendants 1 to 3 were directed to pay the plaintiffs Rs. 30 as damages for the year 1928. There was no claim for mesne profits subsequent to 1928 and the decree awarded none. The decree-holders applied to the District Munsiff in I. A. No. 221 of 1943 for the ascertainment of future mesne profits under Order 20, rule 12, Civil Procedure Code and for a decree for the amount that may be ascertained. They were resisted by the first defendant, one of the three judgment-debtors, who pleaded that the liability had become discharged by reason of section 10, clause (2) of the Madras Debt Conciliation Act, 1936, (*a*) as he applied for a settlement of his debts and the decree-holders did not file any statement setting out this debt arising in connection with future mesne profits and (*b*) that the application under Order 20, rule 12, Civil Procedure Code, was misconceived, as the decree did not award any future mesne profits nor direct any enquiry in this connection.

The District Munsiff dismissed the petition, accepting the first contention but rejecting the second. On appeal, the Subordinate Judge held that the petition under Order 20, rule 12, Civil Procedure Code, was maintainable but that the liability for future mesne profits could not be described as a "debt" within the meaning of the Madras Debt Conciliation Act to be wiped out or discharged by reason of the omission of the creditor to file a statement, as contemplated under section 10, clause (1) of the Act. He pointed out further that, as regards the liability for mesne profits of defendants 2 and 3, there could be no question of its being wiped out, as they did not go before the Debt Conciliation Board, and that the petition was, in any event, wrongly dismissed so far as they were concerned. He remanded the petition to the lower Court for fresh disposal. It is against this order of remand that this miscellaneous appeal has been filed.

It is fairly clear that the liability for future mesne profits, not adjudicated upon by any decision of a Court and the amount being unascertained, cannot well be described as a "debt" within the meaning of the Act. It would really be doing violence to the ordinary meaning of the word to give it this wide and all embracing interpretation. The definition of the word given in the Act does not warrant it. A mature debt, as distinguished from an immature debt, refers to a sum of money that is payable immediately as contrasted with a sum that is due but the payment of which is postponed.

It is equally clear that the liability for mesne profits of defendants 2 and 3 cannot be said to be wiped out by anything that the first defendant did and the decree-holders omitted to do *vis-a-vis* the first defendant's act. The argument is plausible that, by reason of the failure of the decree-holders to file a statement, the first defendant's debt has been wiped off. To say that the joint and several liability of defendants 2 and 3 is also wiped out is to confer on the debtor a protection which would never have been intended by the framers of the Act.

But on the first point, I think the appellant is on firm ground. The District Munsiff held that the petition was maintainable because the Madras amendment to Order 20, rule 12, Civil Procedure Code, introducing clause (3) was comprehensive. The Subordinate Judge took the same view on the strength of the decision in *Muthayya Kone* v. *Rakappan Ambalam*[1]. In my view, they were both wrong. The Madras amendment, as it was introduced in 1911 and as it was further amended in 1941, merely provides for the procedure to be adopted in ascertaining the mesne profits. It does not say that, when there was no claim for future mesne profits in the suit and the decree therefore did not award any, still the Court can, on an application, proceed to ascertain such mesne profits and pass a final decree. For a final decree there must be a preliminary decree, and the preliminary decree must say something which the final decree is to carry into effect. Where the preliminary decree awards no future mesne profits, there can be no final decree awarding the

1. (1935) 70 M.L.J. 87.

same. The amendment introduced to prescribe the procedure to be adopted in such cases,—whether the enquiry was to be held by the appellate Court itself or was to be held by the first Court and whether the enquiry was to be on the application of the decree-holder or otherwise,—has nothing whatever to do with the question whether any relief could be granted later by a Court in a suit, which has fructified into a decree and which does not award such relief. The trouble about the amendment was quite different. When, as it originally stood, it spoke of an application by the decree-holder, the question arose whether Article 181 of the Limitation Act applied. In *Ramasubramanya Pattar* v. *Karimbil Pati*[1], it was held that the Article was inapplicable and that the word "application" referred to in sub-rule (3) could not be held, having regard to the intention of those who framed the rule, to mean an application falling within Article 181. It was in this decision that it was suggested that sub-rule (3) should be amended suitably to make it quite clear that the mischief of Article 181 should not apply, and it was in pursuance of this suggestion that the rule has been further amended and stands, as it does now, with the word "application" taken out and the words "shall whenever moved to do so by the decree-holder" substituted.

Muthayya Kone v. *Rakappan Ambalam*[2] has no application at all. The question whether there can be a claim for subsequent mesne profits not awarded in a prior suit arose in a later suit filed for such subsequent profits and the defendant contended that, as he had deposited in Court some money which he was called upon to deposit for obtaining a stay order and as he had stated in his written statement in one of the previous suits that the plaintiff was at liberty to take possession of the lands, he was not liable for subsequent mesne profits. It was in this connection that Varadachariar, J., pointed out :

> "It is immaterial that in the present case there was no direction in the decree itself for future mesne profits. These provisions indicate the primary liability of the defendant for possession of the immovable property."

He does not lay down that, where there is no claim for future mesne profits in a suit and where the decree does not award any future mesne profits, the Court can, either of its own accord, or moved to do so by the decree-holder, declare in that suit liability for future mesne profits and ascertain the amount. The Court has no jurisdiction to do so and clauses (1) and (2) of Order 20, rule 12, Civil Procedure Code, are quite clear on the subject. The decree must direct the enquiry. Formerly, the question of mesne profits was relegated to the stage of execution. Now it has to be done in the suit itself. Even in a case where relief is claimed but the decree is silent, the relief must be deemed to have been refused. Here we have a case where there was no claim put forward at all for future mesne profits. It is a matter for some surprise that two Courts should have held that still an application under Order 20, rule 12, Civil Procedure Code, would lie.

As I hold that the petition was not maintainable, the order will be that it will stand dismissed with costs right through.

No leave.

K.C. — *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD MACMILLAN, LORD DU PARCQ AND SIR JOHN BEAUMONT.

Kuar Shyam Pratap Singh .. *Appellant**

v.

The Collector of Etawah, representing Rani Rathorni Narain Kunwar and others .. *Respondents.*

Kunwar Kalka Singh .. *Appellant.*

v.

Thakur Shyam Pratap Singh and others .. *Respondents.*

1. (1940) 1 M.L.J. 54 : I.L.R. 1940 Mad. 372 (F.B.).
2. (1935) 70 M.L.J. 87.

*P.C. Appeal No. 11 of 1944. 11th April, 1946.

Hindu Law—Impartible estate—Will by holder of an estate governed by the rule of lineal primogeniture—Construction and effect of—Pedigree prepared by the Court of Wards in pursuance of statutory authority—Sources of information not shown—Value and weight—Accuracy—Presumption as to official acts.

A will executed by the holder of an impartible estate governed by the rule of lineal primogeniture was in the following terms :

"To-day *M* has given him (*P*) to me in adoption and I have taken him in adoption. After my death, my adopted son, *P*, shall be the 'gaddi-nashin' and the owner of my entire movable and immovable property. After my death he shall, like myself, have all the powers. *P* is yet a minor, therefore during his minority, my mother, *B*, who was my guardian during my minority and who managed the entire estate very well, shall remain the guardian of my adopted son *P* and shall manage the entire estate. I have, therefore, executed this will while in a sound state of body and mind and after full deliberation."

On a question as to the construction and effect of the above document,

Held, that the document was not a will within the definition in the Indian Succession Act. It cannot be said that the words would amount to a gift to *P*, because there are no direct words of gift in the will, and there was no object in giving to the adopted son property which he would inherit under the law, whilst the words imputing that he would take the whole estate are as consistent with mere narrative as with gift.

Even if it were construed as a gift to *P*, it is impossible to hold that it had the effect of changing the character of the property from that of an impartible Raj governed by the rule of lineal primogeniture. So to hold would plainly defeat the intention of the testator as disclosed in the document.

A pedigree prepared by the Court of Wards in pursuance of the directions contained in the Court of Wards Manual prepared under the Act is an official document prepared by a public authority in pursuance of a statutory authority, and is evidence, though not conclusive evidence, of the facts stated therein even though it did not show the sources on which the Court of Wards based its findings. In such a case the Court must assume that the Court of Wards did its duty to the best of its ability, and based the pedigree on material of the accuracy of which it was satisfied.

D. N. Pritt, K.C., R. K. Handoo and *B. Sen* for Appellant Kunwar Kalka Singh.

C. S. Rewcastle, K.C. and *S. P. Khambatta* for Appellant Kuar Shyam Pratap Singh.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—These are consolidated appeals from a decree of the High Court of Judicature at Allahabad, dated 1st November, 1939, which affirmed a decree of the Court of the Subordinate Judge of Mainpuri, dated 26th January, 1933, though on grounds different from those on which the decision of the learned Subordinate Judge was based.

The subject-matter in dispute is an impartible estate in the district of Etawah, known as the Partabner Raj. It is not disputed by the parties to this appeal that the Partabner Raj is an ancient Raj, and that down to the death of Raja Hukum hereinafter mentioned it was an impartible estate governed by the rule of lineal primogeniture. The estate was owned at the time of his death, which occurred on the 17th May, 1925, by Raja Hukum Tej Pratap Singh (hereinafter called "Raja Hukum") who died leaving a widow, and a mother, Rani Baisni Madho Kunwar (hereinafter called "Rani Baisni"), but no natural descendants. Shortly before his death, Raja Hukum had adopted a son, Raja Maha Vindeshri Pratap Singh (hereinafter called "Raja Maha"), the minor son of Madho Singh, who was a member of the family of Raja Hukum. Soon after the death of Raja Hukum a suit was filed by his widow and there were mutation proceedings, the question at issue in such suit and proceedings being as to the validity of the adoption of Raja Maha. These proceedings resulted in the adoption being accepted by the interested parties, and as a result, the Revenue Court sanctioned mutation in favour of Raja Maha by an Order dated 29th April, 1927.

By a notification issued under section 15 of the United Provinces Court of Wards Act, 1912, the Court of Wards assumed the management of the Partabner Raj on behalf of Raja Maha as from the 14th December, 1926.

On the 18th February, 1931, Raja Maha was murdered by his natural father, Madho Singh. He died a minor and unmarried.

The suit in which these appeals arise, namely, Suit No. 19 of 1931, was brought by Sheorakhan Singh, who claimed to be the senior male member of the senior branch of the family of Raja Hukum, and accordingly entitled to the estate under

the rule of lineal primogeniture. He died during the pendency of the suit and his son, Shyam Pratap Singh, the appellant in one of these consolidated appeals, was substituted as plaintiff and is hereinafter referred to as "the plaintiff". In the suit Sheorakhan claimed that the properties mentioned in lists "A", "B", "C" and "D" annexed to the Plaint had descended to him as the senior member of the senior branch of the family. The effective defendant was Kunwar Kalka Singh, who was defendant No. 4 and is the appellant in the second of these appeals. He is hereinafter referred to as "the defendant". His case was that he was the senior member of the senior branch of the family.

At the trial the learned Subordinate Judge held that of the properties specified in lists "A" to "D" annexed to the plaint, the properties in lists "A" and "C" were part of the said impartible Raj subject to the rule of lineal primogeniture, that according to this rule the person entitled to succeed to the Raj was not the plaintiff, but the defendant, whose claim as the senior member of the senior branch of the family had been satisfactorily proved, and that the properties in lists "B" and "D" were not part of the impartible Raj but were governed by the ordinary Hindu law of succession and devolved on Rani Baisni as the mother of the adoptive father of the last holder of the Partabner Raj. Accordingly, the learned Subordinate Judge dismissed the suit with costs.

There had been consolidated with the said suit another suit, No. 26 of 1932, which had been instituted by Rani Baisni, in which she claimed that no part of the estate was impartible, or subject to the rule of lineal primogeniture, and that she was entitled to succeed to the whole property under the ordinary law of Hindu succession. As already mentioned, her claim succeeded to the extent of the properties in lists "B" and "D".

Against the said decision of the Subordinate Judge three appeals were preferred to the High Court of Judicature at Allahabad. First, Appeal No. 82 of 1933 by the plaintiff challenging the decree against him in suit No. 19 of 1931, secondly, Appeal No. 109 of 1933 by Rani Baisni challenging that portion of the decree in suit No. 26 of 1932, by which a part of the Partabner Raj estate was held to be impartible and subject to the rule of lineal primogeniture and thirdly, Appeal No. 381 of 1933 by the defendant against that portion of the decree in suit No. 26 of 1932 by which the properties in lists "B" and "D" were held not to be impartible. Rani Baisni died on the 12th June, 1938, and, by Order of the Court dated 1st November, 1939, Appeal No. 109 of 1933 was held to have abated.

On the other two appeals preferred respectively by the plaintiff and the defendant the High Court held that the plaintiff had proved his title to succeed to the Partabner Raj and the properties in lists "A" and "C" as the senior male member of the senior branch of the family, if the rule of lineal primogeniture still applied, but that the properties in lists "B" and "D" did not form part of the Partabner Raj. The Court, however, also held that Raja Hukum had by his will dated 16th May, 1925, given the Partabner Raj and the properties constituting the same to Raja Maha, that such gift had the effect of making the property the self-acquired property of Raja Maha, and that on his death it passed under the ordinary law of Hindu succession to his adoptive grandmother Rani Baisni, though whether she took an absolute estate or the ordinary limited estate of a Hindu widow was not discussed. The Court declined to decide who became entitled to the estate on the death of Rani Baisni, and merely dismissed the appeal and confirmed the decree of the Subordinate Judge.

The plaintiff and defendant have both appealed to His Majesty in Council against the decree of the High Court, but the finding of the lower Courts that the properties in lists "B" and "D" do not form part of the Partabner Raj has not been challenged. The other appellants and respondents have not advanced any independent claims.

The first question which arises for decision on these consolidated appeals is whether the view taken by the High Court as to the construction and effect

of the alleged will of Raja Hukum is correct. Upon this question the plaintiff and defendant have joined forces in attacking the decision of the High Court, and no argument has been advanced before the Board in support of the decision, since Rani Baisni is not represented. Their Lordships can only decide the question as between the parties to this appeal.

The will is in these terms:

"I, Raja Hukum Tej Pratap Singh, am the Raja of Partabner. I have been ill for a long time, and in spite of treatment I am not getting better. Since this morning I have, on the other hand, become much worse. Life is uncertain. Maha Vindeshri Pratap Singh is the son of Kunwar Madho Singh—one of my kinsmen—resident of Padampura, district Etawah. To-day (Kunwar Madho Singh) has given him (Maha Vindeshri Pratap Singh) to me in adoption and I have taken him in adoption. After my death, my adopted son, Lal Maha Vindeshri Pratap Singh, shall be the 'gaddi-nashin' and the owner of my entire movable and immovable property. After my death he shall, like myself, have all the powers. Lal Maha Vindeshri Pratap Singh is yet a minor, therefore during his minority, my nother, Rani Besni Madho Kunwar, who was my guardian during my minority and who managed the entire estate very well, shall remain the guardian of my adopted son Lal Maha Vindeshri Pratap Singh and shall manage the entire estate. I have, therefore, executed this will while in a sound state of body and mind and after full deliberation.

Dated 16th May, 1925. Written by the pen of Sheo Narain."

The learned Subordinate Judge held that this document was not a will within the definition in the Indian Succession Act. He thought that the only operative part of the document was the appointment of a guardian and that all the rest was narrative. On the other hand, the High Court thought that the direction that the adopted son should be the gaddi-nashin and the owner of the entire movable and immovable property of the testator constituted a good residuary gift. Their Lordships do not doubt that these words, taken out of their context, would operate as an effective gift of the whole of the testator's property, but taking the document as a whole, their Lordships prefer the view of the Subordinate Judge. It will be observed that there are no direct words of gift in the will, and that there was no object in giving to the adopted son property which he would inherit under the law, whilst the words imputing that he would take the whole estate are as consistent with mere narrative as with gift. In their Lordships' view the effect of the document is that Raja Hukum states that he is very ill, that he has taken Maha Vindeshri in adoption, that the latter will, therefore, after the testator's death, be the gaddi-nashin and the owner of the whole of his property, that Maha Vindeshri is a minor and, during his minority, the testator appoints his mother to be the guardian of Maha Vindeshri and the manager of the estate.

But, even if the construction adopted by the High Court be correct and the will contains a gift to Raja Maha, their Lordships are unable to adopt the view of the High Court as to the effect of such gift on the character of the estate. The learned Judges referred to several cases, and relied particularly on a recent decision of their Lordships' Board—*Ulagalum Perumal Sethurayar* v. *Subbulakshmi Nachiar*[1]. In that case the owner of an ancestral impartible estate in the Madras Presidency governed by the Mitakshara Law, wishing to exclude his eldest son from the succession, executed a deed settling the estate after his own death on his second son. The Board held that the settlement was within the power of the settlor, and that the second son took the property as his self-acquired property and that it passed on his death under the ordinary Hindu law of succession. In that case, the settlor had deliberately broken the line of succession and settled the estate on somebody outside that line, and that is the *ratio decidendi*. But in the present case, Raja Hukum did not break the line of succession, on the contrary he gave the property to the person who would succeed under the rule of lineal primogeniture, and moreover expressly directed that he should be the gaddi-nashin and have all the powers which the testator had possessed. The various Wajib-ul-arz on record in the Mauza Partabner and other Mauzas show that the sole heir inheriting under the rule of primogeniture is always called the gaddi-nashin. In their Lordships' view it is impossible to hold that this will, even if it operated to give the property to Raja

1. (1939) 1 M.L.J. 812: L.R. 66 I.A. 134: I.L.R. 1939 Mad. 443 (P.C.).

Maha, had the effect of changing its character from that of an impartible Raj governed by the rule of lineal primogeniture. So to hold would plainly defeat the intention of the testator as disclosed in the document.

The question which then arises for decision is that on which the Courts in India differed, namely, whether the plaintiff or the defendant is the senior male in the senior branch of the family and entitled to succeed under the rule of lineal primogeniture. No question arises as to the plaintiff and the defendant respectively being the senior male in his branch of the family; the question is which is the senior branch. The plaintiff and the defendant both claim under one Raja Sambhar Singh, who had 5 sons:—Raja Narain, Hindu, Mohan, Anand and Ratan. The plaintiff's branch of the family is descended from Anand, and the defendant's branch from Hindu, and the question at issue is whether Hindu or Anand was the second son, the other being admittedly the fourth son. As Raja Sambhar Singh was 6 degrees removed from the defendant, and 7 degrees from the plaintiff, it is obvious that no one living can have any personal knowledge as to the respective ages of his sons. At the trial, witnesses were called on both sides who spoke to statements made on the subject by Raja Hukum, Madho Singh, and others, and the Subordinate Judge thought the oral evidence called for the defendant seemed the stronger. But neither of the Courts in India attached much importance to the oral evidence, realising that statements can very easily be put into the mouth of a dead man, and, further, that witnesses may easily have misunderstood such statements, or forgotten their exact import. Their Lordships therefore do not rely on the oral evidence, and think that the question must be decided on the documentary evidence which is somewhat scanty. The High Court considered six documents to be relevant, three supporting each of the parties. On behalf of the plaintiff there was a Jagas bard pedigree book Ex. II (12), a pedigree prepared by one Muhammad Naeem, Ex. XXXVII, and a letter Ex. II (14), enclosing a pedigree of the family Ex. III (2), alleged to have been written by Madho Singh the natural father of Raja Maha and brother of the defendant. Of these three documents, the High Court considered only the last Ex. II (14) and Ex. III (2) to be of any serious value, and their Lordships agree with this view. On the side of the defendant reliance was placed on a letter of Madho Singh written to the Board of Revenue and dated 7th October, 1930, Ex. N, a pedigree Ex. "W," and a pedigree in the estate notebook produced by the Court of Wards, Ex. V. With regard to exhibit "W" both the Courts in India considered that the exhibit assisted the defendant, and the High Court said that it went to the length of proving his case if it was genuine, but the Court held that the exhibit was not genuine. The only portion of the exhibit which has been brought on record in these appeals contains no reference whatever to the matter in dispute and is nugatory. It may be that the relevant part of the document, by some mistake, has not been included in the record but, however that may be, their Lordships can only deal with the record as they find it, and this exhibit does not help either side. The letter, exhibit "N," is relied on mainly as detracting from the weight of the pedigree produced by Madho Singh, and the contest has really resolved itself into a question whether the letter and pedigree emanating from Madho Singh Ex. II (14) and Ex. III (2), or the pedigree produced from the Court of Wards Ex. V is the more cogent piece of evidence.

Exhibit II (14) is a letter from Madho Singh to the plaintiff's father, Sheorakhan, by a familiar name, and is undated, but the High Court considered that it was written in 1925 shortly before the death of Raja Hukum, and their Lordships accept this view. The object of the letter seems to have been to enlist the sympathy of Sheorakhan as a prominent member of the family in relation to an ejectment suit brought against the writer by the Partabner Raj, and complains that the members of the family have become disunited and the writer encloses a genealogical table which is Exhibit III (2). This is the document mainly relied on by the High Court in support of the plaintiff's case. Their Lordships have not seen the original; the print on record shows the name of Anand Singh with a figure "2" after it,

but the names of his brothers are stated to be torn off. There is also a separate pedigree of Baeram Singh, the adopted son of Anand Singh, which is headed:

"Branch of Anand Singh of Dhakpura the second son of Raja Sambhar Singh."

It is this statement which is the really relevant part of the document. There are three considerations which seem to their Lordships to weigh against accepting this document as at all conclusive. In the first place, it is most unfortunate that the initial part of the pedigree has been torn off and that the only reference to Anand Singh as the second son is the statement to that effect quoted above, a statement which could have been interpolated without much physical difficulty. In the second place there is nothing to show how Madho Singh acquired the information which is included in the pedigree; and in the third place there is the letter Exhibit "N" which is one of the defendant's documents. This letter was written on the 7th October, 1930, to a member of the Board of Revenue, Lucknow, and it contains this sentence:

"Had I not been engaged in these narrow circumstances and my son had not been adopted by the late Raja Bahadur I would have been the Raja after his death which can be found out by the genealogy of my family now in possession of the Court of Wards."

It has been argued on behalf of the plaintiff that no weight should be attached to this letter since the writer was plainly trying to make himself out as important a person as possible. The letter may not by itself be entitled to any great weight, but it does show that Madho Singh was prepared to make entirely contradictory statements as to which was the senior branch of the family as suited his purpose. It makes it difficult to rely with confidence on his statements. The High Court thought that Exhibit "N" was not admissible in evidence because it was made after the question in dispute was raised and would therefore not be admissible under section 32, sub-section (5) of the Evidence Act. The High Court relied on the fact that the question of succession had arisen in the mutation proceedings taken shortly after the death of Raja Hukum and some years before this letter was written, but that question turned on the validity of the adoption of Raja Maha. If the adoption was valid the question in dispute in this suit, namely, which is the senior branch of the family, was irrelevant. That question only led to a dispute on the death of Raja Maha in February, 1931. In their Lordships' opinion Exhibit "N" is admissible in evidence.

Exhibit V, which is the document mainly relied on by the defendant, is a pedigree produced in Court by an officer from the Court of Wards. The High Court noticed in its Judgment that section 332 of the Court of Wards Manual prepared under the United Provinces Court of Wards Act provides:

"An estate notebook for each estate under the Court of Wards shall be maintained in triplicate in forms 74 to 87, one copy being kept in the District Office, one in the Divisional Office and one in the office of the Court of Wards. The object of the notebook is to provide a separate and succinct history of every estate under the management of the Court of Wards."

This document therefore is an official document prepared by a public authority in pursuance of a statutory duty, and it is not disputed that it is evidence, though not conclusive evidence, of the facts stated therein. The pedigree portion of the document starts with Raj Sambhar Singh and states his five sons showing Hindu as the second son and Anod (presumably meaning Anand) as the fourth son. The criticism directed against this document is that it does not show the sources on which the Court of Wards based its findings, and that "the assumption of charge file" on which the pedigree purports to be founded was not produced. But this is not criticism of weight against a public document. The Court must assume that the Court of Wards did its duty to the best of its ability, and based the pedigree on material of the accuracy of which it was satisfied. No cross-examination of the two witnesses from the Court of Wards who were called was directed to ascertain the sources on which the pedigree was founded. In their Lordships' view, this is much the most important document on either side and, in the absence of any reason for supposing the document to be incorrect, their Lordships think that it must be accepted as accurate. The learned Judges of the High Court thought that the

document was not entitled to much weight because it had been brought into existence after the controversy had arisen, but their Lordships are unable to accept that view. As already pointed out, the controversy in this suit had not arisen before February, 1931, but, apart from that, the Court of Wards is an entirely impartial body. It has remained in control of the estate since the death of Raja Maha because nobody has succeeded in establishing a title, and there is no reason for supposing that the Court of Wards is interested in the question which branch of the family succeeds.

For these reasons their Lordships think that the defendant has succeeded in proving that he is the representative of the senior branch of the family and entitled to succeed to the Partabner Raj and the properties in lists "A" and "C" annexed to the plaint. The defendant, however, has not preferred any substantive claim and their Lordships can only follow the course adopted by the Subordinate Judge and affirm the dismissal of the plaintiff's suit. In the High Court Rani Rathorni Narain, the step-mother of Raja Hukum, who is represented in these appeals by the Collector of Etawah, was given her costs in both Courts on the ground that it was on the plea of her counsel that the Court held that the Raj had become self-acquired property of Raja Maha. As this plea has now failed there is no reason for giving Rani Rathorni Narain her costs. The High Court after dismissing the appeal directed that the other parties to the suit should bear their own costs. Whether this direction was intended to alter the order of the Trial Court as to costs is not clear. As the defendant failed on some of his contentions in the High Court their Lordships think that each party should bear his own costs in the appeal to the High Court but the order of the Trial Judge as to the costs in the Trial Court will stand. In these appeals both plaintiff and defendant have succeeded on the issue, as to the will, and the defendant, although advancing no substantive claim, has gained some advantage from the plaintiff's suit. Their Lordships think that the plaintiff ought not to be left to bear the whole costs of these appeals.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court dated the 1st November, 1939, be varied by striking out the direction (1) that the parties to the suit other than Rani Rathorni Narain Kuar shall bear their own costs and (2) that the appellant pay the respondent No. 1 the sum of Rs. 1,553-8-0, the amount of costs incurred by the latter in the High Court and in the Court below, and that it be ordered that the parties to the appeal to the High Court should bear their own costs. The appellant Kuar Shyam Pratap Singh, in the first consolidated appeal, will pay two-thirds of the costs of the appellant Kunwar Kalka Singh in the second consolidated appeal to His Majesty in Council. Subject as above these appeals will be dismissed.

Solicitors for Kuar Shayam Pratap Singh : *T. L. Wilson and Co.*

Solicitors for Kunwar Kalka Singh : *Hy. S. L. Polak and Co.*

H.J.U./V.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Kalyanasundara Gounder and another .. *Petitioners.**

Companies Act (VII of 1913), sections 177 and 177-A—Voluntary winding up of company and appointment of liquidators—Resignation of those liquidators—Name of the company struck off the register—New liquidator appointed—Company's name restored in the register by Court and the company ordered to be wound up by the Court—Winding up thereafter—Liquidators at the time of the voluntary winding up refusing to submit statement of information required by the official liquidator—Liability to proceedings under section 177.

There was a voluntary winding up of a company in 1934 and the petitioners were appointed as liquidators. In 1936, both of them resigned their offices as liquidators and on 13th November, 1937, under section 247 (5) of the Companies Act, the name of the company was struck off the register. In 1941, P. W. 3 was appointed as liquidator in place of the petitioners. On an application by him

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* Cr. R. C. No. 35 of 1946. 17th April, 1946.
(Cr. R. P. No. 34 of 1946).

in 1943, the company's name was restored in the register under section 247 (6) of the Act and it was thereafter ordered to be wound up under the provisions of the Companies Act. The Official Receiver of Coimbatore was appointed as the Official Liquidator in respect of this winding up. He called upon the petitioners under section 177 (a) to furnish information which they refused whereupon they were prosecuted and convicted. In revision it was contended that the provisions of section 177 of the Act could not be availed of because the company was one which went into liquidation voluntarily and not by order of Court.

Held, that (1) though the company was originally wound up voluntarily, at the time the proceedings were taken against the petitioners, it was under liquidation by order of Court and hence the provisions of section 177 of the Act would apply. (*ii*) The petitioners were officers of the company bound to give information and on their refusal, proceedings could be taken against them. (*iii*) The words 'subject to the direction of the Court' in section 177-A (2) of the Act cannot be taken to indicate that persons who had been officers of the company can be called upon to submit the statement only if there is a direction by the Court to such officers to submit the account.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Additional First Class Magistrate of Coimbatore dated 3rd September, 1945, and passed in C. C. No. 606 of 1944.

S. T. Srinivasagopalachari for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is a petition to revise the order of the Additional First Class Magistrate of Coimbatore, convicting the petitioners under section 177 (5) of the Indian Companies Act and sentencing the first accused to pay a fine of Rs. 50 with one month's simple imprisonment in default, and the second accused to pay a fine of Rs. 25 with two weeks simple imprisonment in default.

These arise out of proceedings in connection with the winding up of a company known as the Kandagoundanchavadi Balachandra Ganesa Nidhi, Limited. There was a voluntary winding up of the company in 1934. A resolution was passed on 7th January, 1934, which was confirmed on 27th January, 1934. The first accused who was the Secretary was appointed the liquidator, and the second accused was also appointed as an additional liquidator. There was a third liquidator also whose whereabouts are not known. In 1936, it is stated, both the accused resigned their offices as liquidators. On 13th November, 1937, under section 247 (5) of the Indian Companies Act the name of the Company was struck off. In 1941, P. W. 3 was appointed as liquidator in the place of accused 1 and 2; and P. W. 3 filed applications against accused 1 and 2 and took steps against them. In 1943, P. W. 3 took proceedings in this Court for getting the order, striking off of the company, set aside, and on 25th November, 1943, this Court passed an order restoring the name of the company in the register under section 247 (6), and that the said company after being restored as aforesaid be wound up by the Court under the provisions of the Indian Companies Act, 1913. Then the Official Receiver of Coimbatore had been appointed as the Official Liquidator in respect of this winding up. That was on 16th December, 1943. The Official Receiver then called upon these two petitioners under section 177 (a) to furnish information but as they did not furnish the information required they were prosecuted and sentenced as already stated.

What is urged before me is that this is a case which went into voluntary liquidation and not a case of a company which went into liquidation by order of the Court, and therefore the provisions of section 177 of the Act cannot be availed of. To this the short answer is that it is no doubt a company that was originally dissolved by voluntary liquidation and its name was struck off the registers but under the orders of Court the company was restored and the Court directed the winding up after such restoration. Therefore, on the date on which proceedings were taken and when the Official Liquidator called for information it was in respect of a company which was under liquidation by order of Court and the liquidator who was the person in charge at the time was appointed by the Court which directed the winding up of the proceedings. Thus, there is no force in the contention of the

learned counsel for the petitioners that this should be treated as a case of a company wound up by voluntary liquidation and not by order of Court.

The next contention is that if it is considered to be a company wound up by order of Court, there was no jurisdiction for the Official Receiver to call for information from these accused as he had not obtained directions of the Court to so call for information. Reliance is placed upon clause (2) of section 177-A of the Act. Under clause (1) of section 177-A where the Court has made a winding up order, a statement has to be submitted. It is only in the second clause it is stated that the statement shall be submitted and verified by one or more of the persons and in clause (*a*) of that sub-section, it is stated that the statement shall be submitted by persons, who are or have been directors or officers of the company. Accused 1 and 2 were Official Liquidators of this company. In *Rangai Goundan* v. *Emperor*[1], it has been held by this Court that an official liquidator is an officer of the company. Therefore, they were the persons who ought to give the necessary information as required by section 177-A (2) (*a*) and, therefore, they are the persons against whom proceedings should be taken if they failed to submit the account. It is true that there are the words "subject to the direction of the Court" in sub-clause (2) but that cannot be taken to indicate that these persons (accused) are liable to submit the accounts only when they had been called upon by the Court or the Court had directed the liquidator to furnish such a statement. It may be open to the Court to ask the Official Liquidator not to call for accounts if they are able to satisfy the Court that they are not in a position to submit the accounts; the liquidator will then act according to the directions that may have to be given by the Court. I do not think, therefore, that the words "subject to the direction of the Court" can be taken to indicate that such persons who have been the officers of the Court can be called upon to submit the statement only if there is direction by the Court to such officers to submit the account. In this case these two accused are persons against whom there is evidence that they were in possession of records of the Court and when they were in possession of the records and when information was required from them they were the persons who were bound to give it. I am not, therefore, able to see anything unreasonable in their being called upon to submit an account and it cannot be said that the sentences is excessive.

The petition is dismissed.

V.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE SHAHABUDDIN.

On reference*

Criminal Procedure Code (V of 1898), section 240—Mixed charge of murder and offence against property—Procedure to be adopted by the Sessions Judge.

The accused were charged under sections 302 and 380 of the Indian Penal Code and the Sessions Judge purporting to act under rule 156 of the Criminal Rules of Practice separated the charges and tried the accused only on the charge under section 302. Accused one and three were convicted and the second accused was acquitted. Pending an appeal by the two convicted accused, the Public Prosecutor withdrew the charge under section 380. In the appeal it was found that it had not been proved that the third accused was guilty of murder.

On the question whether the third accused could be re-tried and whether section 240 of the Criminal Procedure Code applied,

Held, that (1) the withdrawal of the charge would operate as an acquittal and would bar a re-trial of the accused on that charge unless section 240 operated. (2) There is some doubt as to whether section 240 would apply to the case because of the omission of the Sessions Judge to include a charge under section 380, Indian Penal Code, in his revised charge. (3) When there is a mixed charge of murder and offence against property the Sessions Judge should take the charge framed by the committing Magistrate and adopt it, or if he wishes to change the charge in any way he should include in the modified charge all the various heads found in the charge of the committing Magistrate. In any case it is desirable that the Sessions Judge should not permit the withdrawal of the other charge by the Public Prosecutor until the appeal time has expired and, if an appeal has been filed, the appeal has been disposed of.

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1. (1942) M.W.N. (Cr.) 101.

* Letter D. No. 2527 dated 9th March, 1946, from the Sessions of Tinnevelly. 8th April, 1946.

Letter of Reference from the Sessions Judge of the Tinnevelly Division, D. No. 2527 dated the 9th day of March, 1946, in S. C. No. 13 of 1946, on his file requesting elucidation of the practice to be adopted in cases where the charges against the same accused are separated for trial and when the accused is convicted on any one of the charges and when the Public Prosecutor applies under section 240, Criminal Procedure Code, for the withdrawal of the remaining charge or charges.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—Three persons were charged by the committing Magistrate both with murder and with theft in a building. When the matter came before the Sessions Court, the Sessions Judge purported to act upon the suggestion contained in rule 156 of the Criminal Rules of Practice, separated the charges under sections 302 and 380 of the Indian Penal Code and proceeded only with the trial under section 302. He convicted the first and third accused and acquitted the second accused. The two convicted accused appealed to this Court; but before the appeal was heard, the Public Prosecutor withdrew the charge under section 380 against the appellants and they were acquitted. In appeal, this Court held that it had not been proved that the third accused was guilty of murder. In its judgment, however, it indicated that it would have convicted the third accused under section 411 of the Indian Penal Code had it not been for the circumstance that she had already been acquitted of the charge under section 380, Indian Penal Code. The learned Judge has pointed out in the reference under consideration that the judgment of this Court contains no reference to section 240 of the Code of Criminal Procedure and has asked for instructions as to what he should do in future cases of a similar nature.

A charge must be framed by the committing Magistrate under section 210 of the Criminal Procedure Code against a person committed by him to Sessions. The Code of Criminal Procedure makes no provision for the framing of a fresh charge by the Sessions Court; but section 226 of the Code of Criminal Procedure enables the Sessions Court to add to or alter the charge or to frame one if the Magistrate omits to do so. It would therefore seem that the charge against the accused in the Sessions Court is the charge as framed by the committing Magistrate subject to such addition or alteration as the Sessions Judge may make. Since a charge has already been framed before a case comes before the Sessions Court, any withdrawal of a charge against an accused would operate as an acquittal and would bar a re-trial of the accused on that charge unless section 240 operated.

In his modified charge, the learned Sessions Judge did not include the charge under section 380 of the Indian Penal Code and so, unless the charge of the committing Magistrate can be read together with the charge read out to the accused in the Sessions Court, the withdrawal of the charge would result in an acquittal that would bar a re-trial; for section 240 only applies to charges containing more heads than one framed against the same person. It is perhaps possible to regard the charge in the Sessions Court as the charge framed by the committing Magistrate subject to the alterations made in the charge under section 226. If so, then section 240 would apply and the third accused could have been re-tried. There is, however, some doubt, whether section 240 would apply; because of the omission of the learned Judge to include the charge under section 380, Indian Penal Code, in his revised charge. We therefore consider that the Sessions Judge, confronted with a mixed charge of murder and an offence against property, should either take the charge framed by the committing Magistrate and adopt it or, if he wishes to change the charge in any way, he should include in the modified charge all the various heads found in the charge of the committing Magistrate; so that it can be seen at a glance that the terms of section 240 would apply.

In any case, we consider it desirable—even in the interests of the accused—that the Sessions Judge should not permit the withdrawal of the other charge by the Public Prosecutor until the appeal time has expired and, if an appeal has been filed, the appeal has been disposed of.

V.P.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Tripasura Venkata Narasinga Rao .. *Appellant**

v.

Vysyaraju Surayyaraju and others .. *Respondents.*

Orissa Money-lenders' Act (III of 1939), *section* 10 (1)—*Right to relief under—Mortgagor suing to redeem his mortgage—Suit not a " suit brought by a money-lender " within the meaning of the section—Such a suit, if can be regarded as a suit for sale brought by the mortgagee—Government of India Act* (1935), *section* 205—*Question of law as to interpretation of the Constitution Act raised but not decided—Certificate, if can be issued.*

The provisions of section 10 (1) of the Orissa Money-lenders' Act have no application to a suit brought by a mortgagor for redemption of his mortgage because it is not a " suit brought by a money-lender " within the meaning of the section. The limiting words " in any suit brought by a money-lender " are repeatedly used in various sections of the Act providing for relief to the debtors and the scope of the relief under section 10 (1) of the Act cannot be extended to include cases of suits by the debtors by a construction which would reduce those words to silence. There is nothing irrational in thinking that the Legislature, while providing that the Court should not assist a money-lender to recover more than a certain amount by way of interest on his advances, left him free to insist on payment of the debt in accordance with the general law where the debtor, for some advantage of his own, seeks to obtain a discharge of his debt. A suit for redemption of his mortgage brought by the mortgagor cannot be regarded as a suit for sale brought by the mortgagee merely because the provisions of Order 34, rule 7 of the Civil Procedure Code contemplate the possibility of such a decree in favour of the mortgagee.

Where a question of law as to the interpretation of the Constitution Act is raised in a case but not decided, it cannot be said that the case " involves " that question. Sub-section (2) of section 205 of the Act clearly contemplates that such question should not only have been raised but also decided by the High Court. Reading sub-sections (1) and (2) of section 205, it would seem that a case cannot be said to " involve " a question unless its decision is necessary for the purpose of the case.

Appeal against the decree of the Court of the Subordinate Judge, Chicacole, in O. S. No. 12 of 1939.

B. Sitarama Rao, B. Jagannadha Das and *N. Rajagopala Aiyangar* for Appellant.

Sir Alladi Krishnaswami Ayyar, C. Sambasiva Rao, P. Somasundaram, C. Siva Rao, A. S. Raghava Rao, R. Rangaswami Aiyangar and *V. Viraraghavachari* for Respondents.

The Judgment (10th July, 1946) of the Court was delivered by

Patanjali Sastri, J.—This appeal has been remitted by the Federal Court[1], for determination of the appellant's claim to relief under the Orissa Money-lenders' Act, 1939, the decision of this Court that he is not entitled to any relief under the Madras Agriculturists' Relief Act, 1938, having been affirmed.

The facts relating to the litigation have all been stated in the judgment pronounced by this Court at the former hearing (reported in *Narasinga Rao* v. *Surayyaraju*[2]), and, so far as they are relevant to the present dispute, may be briefly recapitulated. The appellant borrowed a sum of Rs. 26,000 from the first respondent (hereinafter referred to as " the respondent ") on a mortgage of certain immoveable properties situated partly in the Ganjam and partly in the Vizagapatam districts both of which formed part of this Province at the time of the transaction (March 27, 1929). The loan was advanced and the mortgage was executed and registered at Berhampore in Ganjam, the respondent's place of residence. The debt was repayable, also at Berhampore, with compound interest at 14 annas per cent. per mensem. The appellant is a permanent resident of Tekkoli, a village in Vizagapatam, but has also a house at Berhampore for temporary stay in connection with the management of his properties in Ganjam. When the Province of Orissa was constituted in 1936 the town of Berhampore and certain other areas in Ganjam which included some of the mortgaged lands were transferred to that Province. On June 30, 1939, the Orissa Money-lenders' Act, 1939, was passed granting relief to debtors by limiting the maximum rate and amount of interest which may be decreed in respect of loans advanced by money-lenders. It may be mentioned in passing that the quantum of relief provided by that Act is substantially smaller

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* Appeal No. 209 of 1940. 15th July, 1946.

1. (1944) 1 M.L.J. 356 : (1944) F.L.J. 109 (F.C.).
2. (1943) 1 M.L.J. 457 : I.L.R. (1943) Mad. 370.

than that obtainable under the Madras Agriculturists' Relief Act, 1938, a circumstance which presumably influenced the line of argument adopted by the appellant's counsel, Mr. Sitarama Rao at the former hearing when he strenuously contended that the proper law of contract applicable to mortgage in question was the Madras Act and not the Orissa Act as then suggested on behalf of the respondent, a contention which this Court found it unnecessary to go into as it held that the appellant was not an " agriculturist " as that expression was defined in the Madras Act.

Mr. Rajagopala Aiyangar now appearing for the appellant contended that his obligation to pay interest as stipulated in the mortgage deed was affected by the Orissa Act as the proper law of the contract in the circumstances of the case and that accordingly no more interest should be decreed than as provided in that Act. On this contention three points were argued before us :- (1) what is the proper law of the contract for payment in the mortgage deed ? (2) Assuming the proper law to be the Orissa Act, does it operate to affect the respondent's right as mortgagee to recover the full amount from the mortgaged lands situated outside the Province of Orissa ? (3) Does the Orissa Act apply at all in its terms. Although we heard interesting arguments on all these points, we consider it unnecessary to determine the first and second points as we have come to the conclusion that the appellant must fail on the third.

Section 10 (1) of the Orissa Act on which the appellant's claim to relief is founded runs as follows :

"Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise is greater than the amount of the loan originally advanced."

It is unnecessary to read the rest of the section for the purpose of this appeal. It is admitted that the respondent is a money-lender within the meaning of the Act but it is urged on his behalf that the provision has no application here as this suit having been brought by the appellant as the mortgagor to redeem the mortgage is not a "suit brought by a money-lender." This contention is in our opinion bound to prevail as neither of the answers attempted on behalf of the appellant can be accepted as satisfactory. It is said, in the first place, that it cannot be supposed that the Legislature intended to benefit debtors only when they are called as defendants to actions for recovery of the debts and that a construction which limits the scope of the section by restricting the grant of relief to the debtor only to cases where a money-lender sues as a plaintiff is too narrow and irrational. We are unable to agree. When the language used in a statute is plain and unambiguous, it is as unnecessary as it is unprofitable to speculate about the true intention of the Legislature. The limiting words " in any suit brought by a money-lender " are repeatedly used in various sections of the Act providing for relief to the debtors, and we must decline, upon some speculation as to what the Legislature might have intended, to extend the scope of such relief by a construction which in effect would reduce those words to silence. There is nothing irrational in thinking that the Legislature, while providing that the Court should not assist a money-lender to recover more than a certain amount by way of interest on his advances, left him free to insist on payment of the debt in accordance with the general law where the debtor, for some advantage of his own, seeks to obtain a discharge of his debt. It may be noted that in the sections providing for the relief of payment by instalments the restrictive phrase " brought by a money-lender " is absent (*vide* sections 12 and 13). The contrast is significant, showing as it does that in regard to the relief of reduction of interest the introduction of the limiting words was deliberate. If it is thought desirable to extend the scope of the relief afforded by section 10 of the Act to cases like the present, it is for the Legislature to do so, and not for us, by judicial interpretation of the section in its present form, to achieve that result, more especially as the statute is avowedly expropriatory.

It is next urged that even assuming that the Act has made provision for reduction of interest by the Court only in cases where the money lender is suing to recover money lent, a suit for redemption of a mortgage may well be regarded as a suit "brought" by him, having regard to the provisions of the Civil Procedure Code which contemplate a decree for sale or foreclosure as the case may be being passed in default of payment by the mortgagor of the amount adjudged due to the mortgagee (*vide* Order 34, rules 7 and 8). Our attention was also drawn in this connection to the written statement filed by the respondent where he "prays that a decree for the full amount due as per terms of the mortgage bond be given and if the said amount and costs are not paid a decree for sale under Order 34, rule 8 Civil Procedure Code, may be granted." It should however be noted that the respondent's primary prayer is that the "plaintiff's suit may be dismissed with costs" for want of jurisdiction in the Court to entertain the suit, and it would be somewhat incongruous to describe the suit which he wants dismissed as "brought" by him. But apart from this, we cannot, without doing violence to the language, regard a suit for redemption of a mortgage brought by the mortgagor as a suit for sale brought by the mortgagee merely because the Code allows the latter in a certain event to apply for and obtain a decree for sale or foreclosure according to the nature of the mortgage.

The appellant's claim to relief under the Orissa Act also fails and the appeal is dismissed with costs.

(This appeal having been set down for "being mentioned" the Court delivered the following Judgment) :—

Patanjali Sastri, J.—We are asked to certify under section 205 of the Government of India Act, 1935, that this case involves a substantial question of law as to the interpretation of that Act. Although one of the questions raised and argued before us was a substantial question as to the interpretation of sections 99 and 100 of that Act it was considered unnecessary to decide it and the appeal was disposed of on another point. Can it then be said that the case "involves" that question? We think not. Sub-section 2 of section 205 clearly contemplates that such question should not only have been raised but also decided by the High Court, for otherwise it would not be possible for any party in the case to appeal to the Federal Court "on the ground that any such question as aforesaid has been wrongly decided." Reading sub-sections (1) and (2) together, it would seem that a case cannot be said to "involve" a question unless its decision is necessary for the purpose of the case.

In *Gaddam Padmanabham* v. *Pasupuleti Kamaraju and others*[1], one of us sitting alone had to consider whether a certificate under section 205 could be given in respect of a question which was not raised in this Court at all, although it was raised and decided against the appellant in the Courts below. The question having been decided adversely to the appellant by a Full Bench of this Court, Counsel for appellant did not argue the point at the hearing of the appeal and the Court made no reference to it in the judgment. Subsequently however an application was made for the issue of a certificate under section 205 as the question was one of interpretation of the Constitution Act. The Court refused to grant a certificate observing :—

"Section 205 allows an appeal to the Federal Court on 'defined grounds' where a certificate under sub-section (1) is given. One of such grounds which is material here is that a question of the kind specified in the section has been "wrongly decided" which, I take it, means wrongly decided by the Court from whose judgment, decree or final order the appeal is sought to be preferred."

That decision was followed later by a Division Bench. Here, no doubt, the point was raised and argued. But, as already stated, we did not find it necessary to decide it in the view we took on another point arising in the case. The reasoning of the decision therefore applies here and no certificate can be given.

A similar view has been expressed by the Allahabad and Bombay High Courts. In *Muhammad Saidkhan* v. *Shiam Lall and others*[2], the learned Judges observed thus :—

1. (1943) 1 M.L.J. 314.
2. I.L.R. (1944) All. 773.

"The principle underlying all the cases which I have mentioned above is that there must be a pressing necessity for the decision of the point. The point may be important or its attractiveness may invite an adjudication, but can it be said that its importance to the case compels decision? This is the principal test and this test the present application does not answer."

In *Emperor* v. *Savar Manuel Dantes*[1], the Court said, referring to sub-section (2),

"The wording of the sub-section seems to indicate that the Legislature did not contemplate an appeal against a decision not based on a point of law arising under the Government of India Act."

The learned Judges were of opinion that the expression "involves" could not mean the mere possibility of some question of law arising in a remote contigency.

Reference was made by Mr. Rajagopala Aiyangar for the appellant to *Mohamed Mohy-ud-din* v. *The King-Emperor*[2], where the Lahore High Court appears to have given a certificate under section 205 although the decision of the case was not based upon the question of law relating to the interpretation of the Government of India Act. One of the learned Judges dealt with the question in his judgment, but the case was decided in the High Court on a different point. Apparently no objection was raised to the issue of a certificate, and the present question does not appear to have been argued with reference to the terms of section 205. We cannot, therefore, regard the order of the High Court in that case as an authority on the point now arising for our decision.

For the reasons we have indicated we must decline to certify that the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935.

Appeal dismissed.

Certificate under S. 205, *Govt. of India Act, refused.*

V.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KOMAN.

Rednam Dharmarao .. *Appellant**

v.

Rednam Venkata Mahalakshmamma and others .. *Respondents.*

Provident Funds Act (XIX of 1925), section 5 and General Provident Fund (Madras) Rules—Rule 2 (1) (c)—Government servant subscriber to general provident fund—Wife quarrelling with him and living separately till his death without reconciliation—If ceases to be a member of his family so as to enable him to nominate other persons to receive the money to his credit in the fund.

A Government servant who was a subscriber to the General Providend Fund quarrelled with his wife and they lived apart. Then he nominated the three children of a cousin of his as the persons entitled to receive the money standing to his credit in the fund, should he die before retirement. He died before retirement without having become reconciled with his wife leaving a will purporting to leave his provident fund money to the children of his cousin. In a claim by the nominees it was contended that the wife had ceased to be a member of his family and that therefore their nomination was valid.

Held, in the absence of any allegation or proof of unchastity against her, the wife did not cease to be a member of the family when she was living separately and did not forfeit her right to maintenance if she returned to her husband. Accordingly the husband had no right to nominate anybody else to receive the amount to his credit with the fund.

Appeal against the decree of the Court of the Subordinate Judge, Coconada, in O. S. No. 2 of 1943.

K. Bhimasankaram for Appellant.

The Advocate-General (*K. Rajah Aiyar*), *P. S. Raghavarama Sastri* and *P. Anandan Nair* for the Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Order of the Court was delivered by

The Chief Justice.—Sriramarao Naidu, the husband of the first respondent was the Huzur Sheristadar in the Coconada Collectorate. Being a Government servant, he was required to subscribe to the General Provident Fund. He had

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1. I.L.R. (1941) Bom. 491 (F.B.). 2. (1946) 2 M.L.J. 23 : (1946) P.L.J. 64, 82.

* Appeal No. 447 of 1944. 8th November, 1945.

quarrelled with his wife and they had lived apart for several years. On the 6th January, 1940, he nominated as the persons entitled to receive the money standing to his credit in the Fund, should he die before retirement, the two plaintiffs and the third defendant. The plaintiffs are the sons and the third defendant is the daughter of Sriramarao's cousin, Purushottamarao Naidu. It appears from a document filed in the case that in nominating these persons he stated that he had no family. He died on the 30th April, 1942, without having become reconciled with his wife. His nomination remained unvaried and he left a will under which he purported to leave his provident fund money to the two plaintiffs and the third defendant. If his wife were still a member of the family within the meaning of rule 2 (1) (*c*) of the General Provident Fund (Madras) Rules, the nomination was invalid and he had no right to dispose of his provident fund moneys by will. We shall make further reference to this aspect of the case later. The widow (the first defendant) claimed to be entitled to the amount standing to her husband's credit in the Fund, namely, Rs. 13,805. The Provincial Government agreed that she was entitled to the money and directed the Accountant-General to pay it up to her by a named date unless a Court of law had passed an order to the contrary in the meantime. The result was that this suit was filed on the 13th January, 1943, the Provincial Government being made the second defendant.

The Subordinate Judge held that there was no necessity for evidence to be led. He was of opinion that the case could be decided on the pleadings and the provisions of the Provident Funds Act and the rules framed thereunder. He held that the nomination of the plaintiffs and the third defendant was invalid as the first defendant had not ceased to be a member of her husband's family and that she was entitled to the money. Consequently he dismissed the suit with costs. The first plaintiff alone has appealed.

Section 5 of the Provident Funds Act, states that subject to the provisions of the Act, but otherwise notwithstanding anything contained in any law for the time being in force, or any disposition, whether testamentary or otherwise, by a subscriber to, or depositor in, a Government or Railway Provident Fund of the sum standing to his credit in the Fund, or of any part of it, a nomination, duly made in accordance with the rules of the Fund, which purports to confer upon a person the right to receive the whole or part of the sum on the death of the subscriber or depositor, shall be deemed to confer the right absolutely, until the nomination is varied by another nomination made in like manner or is expressly cancelled by notice given in the prescribed manner and to the prescribed authority. Therefore, where there is a valid nomination, a subscriber cannot by will deprive the nominee of the money should he die before he retired from Government service. He can vary his nomination or he can cancel it on taking the proper steps.

Rule 2 (1) (*c*) (*i*) says:

"'Family' means—

(1) in the case of a male subscriber, the wife or wives and children of the subscriber, and the widow or widows, and children of a deceased son of the subscriber. Provided that if a subscriber proves that his wife has been judicially separated from him or has ceased under the customary law of the community to which she belongs to be entitled to maintenance, she shall henceforth be deemed to be no longer a member of the subscriber's family in matters to which these rules relate, unless the subscriber subsequently indicates by express notice in writing to the Account Officer that she shall continue to be so regarded:"

In the Madras Presidency, the Account Officer is the Accountant-General. It is common ground that the proof that a wife has been judicially separated from the subscriber or has ceased under the customary law of the community to which she belonged to be entitled to maintenance means proof to the Accountant-General.

Rule 7 (1) provides that the Account Officer shall, as soon as may be after a subscriber joins the Fund, require him to make a nomination. Sub-rule (2) says that a subscriber who, at the time of joining the Fund, has a family shall send to the Account Officer a nomination in the form set forth in the first schedule in favour of one or more members of his family. Sub-rule (3) says that a subscriber who has no family shall similarly nominate a person or persons in the form set

forth in the second schedule, provided that a nomination made under this sub-rule shall be deemed to be made in accordance with the rules only for so long as the subscriber has no family.

Rule 30 (*i*) (*b*) provides that on the death of a subscriber before the amount standing to his credit has become payable or where the amount has become payable, before payment has been made, when a subscriber leaves a family, if no nomination in favour of a member or members subsists, or if the nomination relates only to a part of the amount standing to his credit in the Fund, the whole amount or the part thereof to which the nomination does not relate, as the case may be, shall, notwithstanding any nomination purporting to be in favour of any person or persons other than a member or members of his family, become payable to the members of his family in equal shares. Sub-rule (*ii*) of rule 30 says that when a subscriber leaves no family, if a nomination made by him in accordance with the rules in favour of any person or persons subsists, the amount standing to his credit in the Fund or the part thereof to which the nomination relates, shall become payable to the nominee or nominees in the proportion specified in the nomination.

It is quite clear that the plaintiffs and the third defendant were not members of the subscriber's family and they can only have the benefit of the nomination he made if his wife had ceased to be a member of his family.

For the appellant it is said that she had ceased to be a member of the family, because she had ceased to be entitled to maintenance. Even on the allegations against the first defendant in their plaint, she had not ceased to be entitled to maintenance. If the facts alleged by them are true, she could not claim separate maintenance, but she had done nothing to forfeit her right to be maintained by her husband if she returned to him. This Court has drawn a distinction between a suspension of a right to maintenance and its forfeiure. *See The Queen* v. *Marimuttu*[1], *Surampalli Bangaramma* v. *Surampalli Brambaze*[2], and *Periambal Chettiar* v. *Sundarammal*[3]. In the first of these cases, a Division Bench held that ex-communication from caste *per se* did not deprive a Hindu wife of a right of joint enjoyment of her husband's house so as to make her a trespasser if she entered it to claim maintenance.

If the first defendant, while separated from her husband, had lived an unchaste life, she would thereby have forfeited her right to maintenance; but there is no allegation made against her chastity. It would appear that she quarrelled with her husband because she would not agree to adopt a brother of the plaintiffs. The first defendant had always a right to go back to her husband's house and of demanding admission and maintenance therein.

In our judgment the proviso to rule 2 (1) (*c*) (*i*) does not imply that a wife ceases to be a member of the family when she is living separately from her husband and is not entitled to claim maintenance in a separate residence. She is still a member of his family when she has the right to return to her husband and demand to be maintained in his house. It was averred in the plaint, and the averment is persisted in, that the Accountant-General had, before accepting the nomination of Sriramarao Naidu, held an enquiry into the question whether first defendant had forfeited her right to maintenance and that he had accepted the nomination because this had been proved to his satisfaction. In view of what is stated in the proceedings of the Board of Revenue relating to the claims of the respective parties, (Ex. D-2) it does not appear to be likely that there was any such enquiry; but as the plaintiffs were not given an opportunity of leading evidence on this question we think that they should be allowed to do so.

In these circumstances we will call for a finding on the following question:

"Whether the Accountant-General, before admitting the nomination made by Srirama Rao Naidu on the 6th January, 1940, in favour of the plaintiffs and the third defendant inquired whether the first defendant had forfeited her right to maintenance and what was his finding."

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1. (1881) I.L.R. 4 Mad. 243.
2. (1908) 18 M.L.J 254: I.L.R. 31 Mad. 586.
3. (1945) 1 M.L.J. 58: I.L.R. (1945) Mad.

By forfeiture we mean that by her conduct she had in law forfeited her right to return to her husband and claim maintenance in his house.

The Subordinate Judge will hear what evidence the parties wish to adduce on this question and will submit his finding within six weeks of the receipt by him of the records in the case. Ten days' time will be given for the filing of objections.

[This case came on for hearing after the return of the finding before the Chief Justice and Kuppuswami Ayyar, J., on 15th July, 1946 and the Court delivered the following Judgment.]

The Judgment of the Court was delivered by

The Chief Justice :—The Subordinate Judge has submitted the finding called for in this Court's order of the 8th November, 1945. It is to the effect that there was no inquiry made by the Accountant-General. This means that the appeal fails and must be dismissed with costs, one set to be divided between the respondents.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Ramaswami Naicker .. *Petitioner**

v.

Rangaswami Naicker and another .. *Respondents.*

Criminal Procedure Code (*V of* 1898), *sections* 259 *and* 350—*Discharge under section* 259 *by Court to which case had been transferred after the framing of a charge—Legality—Granting of* de novo *trial, if wipes out charge already framed.*

In a warrant case, where a charge has been framed and the case thereafter transferred to another magistrate who grants a *de novo* trial, it is not competent to that Magistrate in the absence of the complainant to pass an order of discharge under section 259 of the Criminal Procedure Code ignoring the charge already framed. Even if the order amounts to an acquittal, it is open to the High Court to set it aside.

The granting of a *de novo* trial has not the effect of wiping out a charge already framed.

Sriramulu v. *Veerasalingam*, (1914) 27 M.L.J. 589 : I.L.R. 38 Mad. 585 and In re *Ramanna*, (1932) 65 M.L.J. 791, Applied.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Sub-Magistrate of Virudhunagar dated 18th September, 1945 in C.C. No. 409 of 1945.

K. P. Raman Menon for Petitioner.

K. Veeraswami for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This case was first tried by the Sub-Magistrate of Sattur, who after examining the witnesses for the prosecution framed a charge against accused 1 and 2 under sections 324 and 323 Indian Penal Code respectively on the 3rd May, 1945. Subsequently the Sub-Divisional Magistrate of Sivakasi transferred the case to the file of the Sub-Magistrate of Virudhunagar. The case was taken on file on the 20th June, 1945, and summons issued to the accused and notice to the complainant. On 27th July, 1945, the accused applied to the Magistrate for a *de novo* trial and the application was granted and all the prosecution witnesses were resummoned and reheard. The case stood posted on the 18th September, 1945, for the examination of the medical witness who was the only remaining prosecution witness. On that day the complainant was absent when called. The Sub-Magistrate of Virudhunagar discharged the accused and passed the following order :

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* Cr. R. C. No. 1109 of 1945. (Cr. R. P. No. 1026 of 1945). 2nd August, 1946.

"The complainant not appearing this day, the date fixed for the hearing of the case, and it appearing that the alleged offence is one which may be lawfully compounded, the Court directs under section 259, Criminal Procedure Code, that the accused be discharged."

This application is to revise the abovementioned order of discharge passed by the Sub-Magistrate of Virudhunagar.

The question for decision is whether in a warrant case after a charge has been framed a Court to whom the case was transferred after the framing of the charge can discharge an accused person when the complainant is not present. The contention of the respondent is that since there has been a *de novo* trial granted in this case by the sub-Magistrate of Virudhunagar the charge framed by the Sub-Magistrate of Sattur should be deemed to have been wiped out altogether by reason of section 350, Criminal Procedure Code and that so long as there is no charge subsisting it is open to the Court under section 259, Criminal Procedure Code to discharge the accused if the complainant is absent. The view propounded by the respondents' advocate that the charge should be deemed to have been wiped out when a *de novo* trial is granted cannot be upheld. A Bench of this Court held in *Sriramulu* v. *Veerasalingam*[1], on similar facts that where a Magistrate framed charges against an accused person and was succeeded by another Magistrate who recommenced the case under section 350, Criminal Procedure Code the succeeding Magistrate cannot ignore the charge framed by his predecessor and his position is practically the same as that of his predecessor would have been if, after framing a charge, he had heard further cross-examination of the prosecution witnesses under section 256 (1) and on a consideration thereof became satisfied that the charge was not well founded. The reason of the rule was set out thus in the judgment of Ayling, J.

"The only object of the substantive portion of clause (1) of section 350, seems to be to leave it to the discretion of the Magistrate to either act on evidence recorded by his predecessor or to hear it over again for himself. The discretion is somewhat restricted by proviso (*a*) and proviso (*b*) gives the superior Courts special powers of interference. Subject to these provisos the discretion is absolute. It is not clear why this should involve the cancellation of the charge or the transformation of the proceedings from a 'trial' back into an 'inquiry'."

This decision was followed in In re *Ramanna*[2], by Gurgenven, J., who held that in such circumstances it is not open to the second Magistrate to ignore the charge and he must proceed with the case on the footing that the charge has already been framed. The learned Judge pointed out :

"It is sometimes loosely described as a right to a *de novo* trial, but all that the provision allows is that he may demand that the witnesses or any of them be resummoned and re-heard. When a charge has already been framed, this, as Ayling, J., remarks, makes the Magistrate's position practically the same as that of his predecessor would have been if, after framing a charge, he had heard further cross-examination of the prosecution witnesses under section 256 (1). It follows that if the second Magistrate is not to frame a fresh charge but to act upon the charge already framed, no occasion can arise for any cross-examination after the framing of the charge and in fact, the reasons for allowing such further cross-examination cannot in the circumstances exist."

In an unreported judgment in *Abdul Hameed Rowther and others* v. *Mohamed Sali Rowther*, (Cr. R. C. No. 498 of 1938—Cr. R. P. No. 463 of 1938), Lakshmana Rao, J., has followed the decision in *Sreeramulu* v. *Veerasalingam*[1].

The learned advocate for the respondent has drawn my attention to two other cases in *Sardar Khan Sahib* v. *Athnalla*[3] and *Ramalingam Pillai*, In re[4]. In neither of these two cases which were decisions of single Judges was the Bench decision in *Sreeramulu* v. *Veerasalingam*[1], referred to and although it is held that on the granting of a *de novo* trial prior proceedings are wiped out, there is no reference to the question that is at issue here whether the resummoning and re-hearing of witnesses under proviso (*a*) to section 350 (1) of the Criminal Procedure Code at the instance of

1. (1914) 27 M.L.J. 589 : I.L.R. 38 Mad. 585.
2. (1932) 65 M.L.J. 791.
3. (1924) 47 M.L.J. 926.
4. (1934) 67 M.L.J. 293: I.L.R. 57 Mad. 1019.

the accused has the effect of wiping out the charge already framed against the accused. In this state of the decisions, I feel bound to give effect to the principle involved in the Bench decision.

The result is that in a warrant case where a charge has been framed the Magistrate is not competent in the absence of the complainant to pass an order of discharge under section 259, Criminal Procedure Code, ignoring the charge already framed. The order of discharge passed in this case, being contrary to law, has to be set aside.

(This case having been set down for "being mentioned" the Court made the following order) :—

It has to be noticed that in *Sreeramulu* v. *Veerasalingam*[1], an order of discharge passed after the charge had been framed was viewed as an order of acquittal. With regard to this aspect of the case, I have heard the parties once again as also the learned Public Prosecutor. There can be no question that this Court has the power in a proceeding of this kind to set aside the order even if it amounts to an order of acquittal. For the reasons that I have given in setting aside the order as one of discharge, I find that the order even viewed as one of acquittal, cannot be upheld and it is therefore set aside.

The petition is allowed. The case will be restored to file and the Magistrate is directed to rehear it.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Hairoon Bibi .. *Appellant**

v.

The United India Life Insurance Co., Ltd., Madras .. *Respondent.*

Contract Act (IX of 1872), sections 4 and 50, Illustration (d)—*Acceptance in the manner indicated by the proposer—Valid acceptance—Request for extension of time for payment of premium in respect of a lapsed Life Insurance policy—Company granting time and directing policy-holder to 'remit' the premium before a certain date—Remittance of the amount by money order within time—Death of policy-holder before the actual receipt of the premium by the company—Remittance by post, if binding on the company.*

On a request by the holder of a life insurance policy for extension of time for payment of the premium in respect of his lapsed policy, the life insurance company stated in their letter of 21st November, 1939, that "since the policy will continue to be under lapse till the receipt of the premium amount, we would urge you to remit this amount as early as possible even before the 8th December 1939, so that the insurance protection may continue to be bestowed on the policy." The policy-holder remitted the amount by money-order on the 28th November, well within the 8th December, 1939, and the amount reached the company's branch office on 30th November, 1939. But the policy-holder died suddenly on the 29th November, 1939. On a claim for payment of the insurance amount, it was pleaded in defence that as the assured was dead before the premium was actually received by the company the policy which had lapsed was not in force. On the question whether the remittance by post can be said to be binding against the company in the sense that a proposal made by them for payment in a particular manner was accepted by the policy-holder so that it became an effective payment against them from which they could not resile on the ground pleaded by them in defence,

Held, that though the word 'remit' did not necessarily mean sending the money by post, in the circumstances, such a remittance was not only one of the modes that must have been in the contemplation of the parties, but it was probably the mode of payment that was intended. The remittance by post was binding against the company. As soon as the money was put into the post office following the demand by the company, the lapsed policy revived. The fact that the sender could under the post office rules call back the money order did not in any way detract from the rule that acceptance in the manner indicated by the proposer or offeror constitutes in law a good and valid acceptance.

Appeal against the decree of the Court of the Subordinate Judge, South Arcot, at Cuddalore, in A. S. No. 59 of 1944, preferred against the decree of the Court of the District Munsiff, Kallakurichi, in O. S. No. 547 of 1941.

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1. (1914) 27 M.L.J. 589: I.L.R. 38 Mad. 585.

* S. A. No. 364 of 1945. 15th July, 1946.

V. C. Viraraghavan for Appellant.

K. S. Rajagopala Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff sued for the recovery of a sum of Rs. 1033 due by the defendant company in respect of a life insurance policy which stood in the name of her husband Abdul Karim Saheb. The insurance policy is dated 1st February, 1938. It provides that the date of the commencement of the assurance was on the 8th January, 1938, and the quarterly premium payable was Rs. 12-9-0. The amount was subsequently enhanced into Rs. 13-2-0. A quarterly premium was payable on the 8th October, 1939. It was not paid on the due date, and under the terms of the policy, there was one month's period of grace from that date for payment. The amount was not paid even within this month and Abdul Karim, the assured, wrote to the company, under Ex. D-6, on 19th November, 1939, asking for an extension of one more month of the days of grace and stating that he would pay the premium with the penalty due by the 8th December, 1939. This letter elicited the reply, Ex. P-11, from the company on 21st November, 1939, in which they asked him to send a sum of Rs. 13-10-0 for premium and interest so that they could send him a receipt and they state :

"Since the policy will continue to be under lapse till receipt of the premium amount, we would urge you to remit this amount as early as possible even before 8th December, 1939, so that the insurance protection may continue to be bestowed on the policy."

Abdul Karim remitted the amount by money order from his village on 28th November, 1939, well within the 8th December, 1939, and the amount reached the company's branch office on the 30th November, 1939. But Abdul Karim died suddenly on 29th November, 1939. When a claim was made for payment of the insurance amount, the widow was met with the plea that as the assured was dead before the premium was actually received by the company the policy which had lapsed was not in force and that nothing was therefore due and payable to her. It was in these circumstances that she filed the suit. It was dismissed by the District Munsiff of Kallakurichi and the decree was confirmed by the Subordinate Judge of Cuddalore. The second appeal has been preferred against these decisions.

Clause 3 in the policy of insurance provides for the revival of lapsed policies. On the fulfilment of certain prescribed conditions the lapsed policy will revive. The revival is not dependent on the goodwill or grace of the company. Of course, the very idea underlying the revival of a lapsed policy is that the assured should be alive on the date of the revival. If he was dead when the policy was in a state of lapse, there could be nothing like any revival at all.

Therefore we have to find out whether in this case the policy had been revived on or before the 29th November, 1939, when Abdul Karim died, and this brings us to a consideration of the question whether the remittance of the premium by post on the 28th November, 1939, can be said to be binding against the company in the sense that a proposal made by them for payment in a particular manner was accepted by Abdul Karim so that it became an effective payment against them from which they would not resile on the ground that the money was not actually received by their branch till after the man died. Two points arise in this connection. One is whether the letter from the company asking Abdul Karim to remit the amount connotes or involves a remittance by post. The other is that even if it does so, whether the fact that the sender could under the post office rules call back the money order detracts in any way from the rule that acceptance in the manner indicated by the proposer or offeror constitutes in law a good and valid acceptance.

I agree that the word "remit" does not necessarily mean sending the money by post. The idea of a direct payment in person or by messenger might also be involved ; but in construing a commercial letter we have to pay regard to the practice or course of dealing between the parties and find out what could have been intended. Abdul Karim was in an out of the way village in the district and we

have evidence of a number of occasions when premia were sent by postal money order. Therefore such a remittance is not only one of the modes that must have been in the contemplation of the parties, but one is led to think in the present case, having regard to what happened previously that it was probably the mode of payment that was intended.

That the remitter has got a right, qualified or absolute, to instruct the post office not to pay the money to the payee, which is said to be provided by rules 275 and 276 of the rules framed under the Indian Post Office Act, has in my opinion nothing to do with the question whether when the person who is called upon to do a particular thing does it in the manner in which the proposer authorises him to do it, the proposer is not bound by what has been done. The law on the subject is very clear and is found laid down not only in section 4 of the Indian Contract Act and in the illustrations thereto but also in section 50 of the same Act, illustration (*d*). It is also found discussed at length in *Henthorn* v. *Fraser*[1]. There is nothing in the rules referred to above which compels us to modify the general proposition of law that if the promisee prescribes or sanctions any manner of performance, performance in that manner discharges the obligation of the promisor.

Mr. Rajagopala Aiyangar ingeniously argued that the proposal came from Abdul Karim asking for an extension of time for payment till a particular date and the acceptance was by the company of this proposal and he contended that it was not a case where there was a proposal by the company which was accepted in any particular manner by Abdul Karim. It is hardly necessary to meet this argument at any length because letters from one party to the other may contain proposals and counter proposals. We have to look at the substance and find out on any particular occasion who was the offeror and what was the offer and whether it was accepted or not by the opposite party. When the company told Abdul Karim that he should remit the money well before the 8th December, 1939, so that the protection of the insurance policy might be available to him, they no doubt accepted to grant him the time he wanted but proposed also that he should send the money in a particular manner and this proposal by them was accepted in turn by Abdul Karim by the money being sent by post, as it used to be sent even previously.

The defence raised is highly technical and in my opinion should not be given effect to unless we are compelled to do so by law. I find we are not so compelled and that the remittance by post is binding against the company. As soon as the money was put into the post office, following the demand by the company, the lapsed policy revived.

The second appeal is allowed and the decrees of the lower Courts are set aside and the plaintiff will have a decree for the amount claimed in her plaint with interest at six per cent. per annum from the due date till date of realisation. The company will pay her costs right through. The respondent will pay the Court-fees due to the Government. No leave.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

V. Lakshmipathi Naidu, sole proprietor of the Nilgiri Potato Supply Co. *Petitioner**

v.

M. E. Mohamed Ghani .. *Respondent.*

Civil Procedure Code (V of 1908), section 20 (c)—Suit for damages for breach of contract—Jurisdiction at place where contract had to be performed in part—Cause of action.

A suit for breach of contract can be filed at any place where the contract should have been performed in whole or in part. A suit for damages for breach can be filed at the place either where

1. (1892) 2 Ch. 27.

* C. R. P. No. 281 of 1945. 30th July, 1946.

the goods were deliverable or the price payable. Part of the cause of action arises where the price is to be paid.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of Small Causes, Madras, in N. T. A. No. 30 of 1944 against the decree in S. C. S. No. 1601 of 1943 on its file.

M. Ranganatha Sastri for Petitioner.

Ramanujam and *Venkataseshayya* for Respondent.

The Court delivered the following

JUDGMENT.—The only question of jurisdiction which arises in this petition under section 115 of the Code of Civil Procedure is whether the Small Cause Court, Madras, had jurisdiction to try this suit. Both the trial Judge and the Full Bench held that the Court had jurisdiction.

In brief, the contract was one for the supply of onions to the agent of the first defendant at Calcutta. The price was to be paid at Madras. The defendants refused to accept delivery at Calcutta; and so the plaintiff filed the suit with which we are concerned. The Courts below held that since part of the cause of action arose in Madras, namely, the payment of the price, the Court at Madras had jurisdiction.

It is argued that although the suit on the contract lay at Madras, it did not follow that a suit on a breach of this contract would also arise there. The learned advocate for the petitioner first referred me to certain passages in Mulla's commentary; but the learned commentator does not suggest that when a suit on a contract lies at a particular place because part of the performance was to be there, a suit for a breach of the contract might not lie there. For example, we find under the head " Cause of action in suits on contracts,"

> " In a suit for damages for breach of contract the cause of action consists of the making of the contract and of its breach; so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred."

This passage therefore suggests, what I believe to be a general rule with few, if any, exceptions, that a suit for a breach of contract can be filed at any place where the contract should have been performed in whole or in part. Lower down under the same heading, we find another passage which makes the matter even clearer:

> " The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract should have been performed or its performance completed. The usual case is that a contract for sale of goods and a suit on such a contract may be filed at the place where the goods were deliverable or the price payable."

Two cases have been cited in which it is suggested that a contrary conclusion has been arrived at. Although in *Gaekwar Baroda State Railway* v. *Habib Ullah*[1], the price for the goods had to be paid at Baroda, yet the learned Judges held that the suit on the breach of contract could be filed only at Agra; but the special circumstance that led to that conclusion was that when the defendant failed to take delivery of the goods, the plaintiff sent to him a notice calling upon him to take delivery of the goods and pay the price *to his agent at Agra* (the place at which the goods were to be taken delivery of). The plaintiff therefore relieved the defendant of his obligation to pay for the goods at Baroda and permitted him to pay the price at Agra, the place at which he was to take delivery of the goods. The other case relied upon is a Bench decision of this Court in *Kamisetti Subbiah* v. *Kathavenkataswamy*[2]. There the defendant was the commission agent of the plaintiff living at Madras. The plaintiff was residing at Kurnool. He brought a suit for damages against the defendant, alleging that the defendant had sold some of his goods at inadequate price. The learned Judges pointed out that the suit was one for negligence and misconduct and was either one in tort or, if on contract, it was of a

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1. (1933) I.L.R. 56 All. 828. 2. (1903) I.L.R. 27 Mad. 355.

tortious nature. Since the suit was based on misconduct, and the misconduct had been in Madras, the whole cause of action arose there and the suit was not maintainable at Kurnool. This decision might have been of some value to the plaintiff had this matter not been finally set at rest in *Venkatachalam Pillai* v. *Sajun*[1], a decision of a Full Bench of this Court. That was a case somewhat similar to the present one, except that there the suit was by the person to whom the goods were sent. He sought to recover damages on account of short fall and inferiority of quality of the goods sold to him by the plaintiff. The learned Judges held that since it appeared that the goods were to be paid for at Tuticorin, a part of the cause of action arose at Tuticorin, and that therefore a suit for a breach of the contract could be filed in that place. The only criticism that can be made of that decision is that the matter of jurisdiction was not very fully discussed. The learned Judges seemed to assume that if a suit on a contract could be filed at a place because the payment was to be made there, it followed that a suit for breach of contract could be filed in the same place for the same reason. That is what the learned commentators have said in the passages referred to above. Somewhat similar passages are to be found in Chitale and Annaji Rao.

I have no doubt that the lower Courts were right in holding that they had jurisdiction to try the suit.

The petition is dismissed with costs.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Kanteti Venkata Seshavatharam and others .. *Appellants**

v.

Chapalamadugu Venkata Rangayya and others .. *Respondents.*

Income-tax Act (XI of 1922), section 54 (3) (m)—"To the appropriate authority"—Construction—Civil Court not excluded—Civil Procedure Code (V of 1908), Order 41, rule 27 (1) (b)—Court requiring additional evidence for satisfactory decision of case—Delay or negligence of party concerned—Relevancy.

To say that the expression "to the appropriate authority" in clause (m) of section 54 (3) of the Income-tax Act covers only the collector acting under section 26 of the Madras Agriculturists' Relief Act or such other officer as may have occasion to ascertain the particulars referred to in the clause for the purpose of discharging his official duties but not a civil Court, is to put a narrow construction on the clause. The wider term "authority" was presumably used with a view to bring also officers such as a collector acting under section 26 of the Madras Agriculturists' Relief Act within the purview of the clause. It cannot be said that the term excludes the civil Court where it is called upon to determine judicially whether a person has or has not been assessed to income-tax in a given year. A Court having the duty of determining whether a party was assessed to income-tax in a given year or years has the power to call upon the income-tax department to disclose the particulars necessary for determining that issue, and the High Court sitting in appeal, has also such a power.

When an appellate Court thinks that the question arising in the case cannot be decided satisfactorily on the materials on record and that additional material is required in order to clear the doubt of the Court, it can call for such evidence under clause (*b*) of rule 27 (1) of Order 41, of the Civil Procedure Code and in such case the question of the delay or negligence of a party does not arise.

Appeal against the decree of the District Court of Kistna, at Chilakalapudi, in O. S. No. 30 of 1942, and petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to call for the original records relating to the assessment to income-tax for 1936-37 of the defendants' family from the Income-tax authorities and print the same if necessary in the said Appeal No. 434 of 1944.

Sir Alladi Krishnaswami Aiyar and *K. Umamaheswaram* for Appellants.

V. Govindarajachari for *B. Manavala Chowdhury* and *T. K. Subramania Pillai* for Respondents.

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1. (1934) 68 M.L.J. 504 (F.B.).

*Appeal No. 434 of 1944 and C. M. P. No. 3534 of 1945. 8th July, 1946.

The Order of the Court was made by

Patanjali Sastri, J.—One of the questions raised in this appeal is whether the defendants were agriculturists within the meaning of the Madras Agriculturists' Relief Act, 1938. The plaintiffs who are the appellants here claimed that the defendants were disqualified from claiming the status of an agriculturist under the Act by reason of their having been assessed to income-tax during the period specified in proviso A to section 3, clause (*ii*) of the Act, that is to say, in either of the two financial years ending 31st March, 1938. It has been held by this Court in *Rajoo* v. *Palaniappa Chettiar*[1], that the disqualifying assessments must have been made not *for* the two financial years mentioned in the proviso, but must have been made *in* either of those years, as the assessment for any year need not necessarily be made in that year under the Indian Income-tax Act, 1922. In order to establish the disqualification the plaintiffs filed Ex. P-6 a memorandum granted by the Collector of Kistna under section 26 of the Madras Agriculturists' Relief Act to one Rattayya who was also a creditor of the defendants. This memorandum discloses that Chapalamadugu Rangayya who is admitted to be the manager of the joint family of the defendants was assessed to income-tax for 1936-37 as representing a Hindu undivided family and was not assessed for 1937-38. The memorandum thus throws no light on the point to be determined in the case, for as we have pointed out above what is relevant is not assessment to income-tax *for* the years 1936-37 and 1937-38 but assessment made *in* 1936-37 and 1937-38. Ex. P-18 is another memorandum granted by the same officer on the application of the plaintiffs. It states that Rangayya was *not* assessed to income-tax *for* the two financial years ending 31st March, 1937, and 31st March, 1938. So far as the financial year ending 31st March, 1937, is concerned, this memorandum flatly contradicts the statement in Ex. P-6 that Rangayya was assessed to income-tax for that year. Other similar memoranda granted to the defendants and others have been produced on the defendants' side, Exs. D-5, D-6 and D-14 stating that no assessment in 1936-37 and 1937-38 was made on the said person.

It is suggested by Sir Alladi Krishnaswami Aiyar appearing for the appellants-plaintiffs that in view of the doubt and confusion in which the question relating to the assessment for 1936-37 is involved, we should in the exercise of the powers under Order 41, rule 27, Civil Procedure Code send for the records of the income-tax office concerned to clear up the matter. He relies upon the newly introduced clause (*m*) of section 54 (3) of the Indian Income-tax Act as empowering us to call upon the income-tax department for the production of the records relating to the assessments to income-tax made on Rangayya in the years 1936-37 and 1937-38, the two relevant years for the purposes of the Proviso A. It is, however, urged by Mr. Govindarajachari for the respondents that the expression "to the appropriate authority" in clause (*m*) covers only the collector acting under section 26 of the Madras Agriculturists' Relief Act or such other officer as may have occasion to ascertain the particulars referred to in the clause for the purpose of discharging his official duties but not a civil Court, as a "Civil Court" is referred to as such in clause (*d*) of section 54 (3) and not as an "authority." We are unable to accept this narrow construction of the clause. Obviously the clause contemplates the authority concerned calling for such particulars in order to enable it to determine whether a person has or has not been assessed to income-tax in any particular year. Such an issue arises in the present case and the Court has to determine it one way or the other. The wider term "authority" was presumably used with a view to bring also officers such as a collector acting under section 26 of the Madras Agriculturists' Relief Act within the purview of the clause. We cannot agree that the term excludes the civil Court where it is called upon to determine judicially whether a person has or has not been assessed to income-tax in a given year. We are satisfied that the Court below having the duty of determining whether the defendants were assessed to income-tax in either of the two relevant years had the power to call upon

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1. (1940) 2 M.L.J. 817.

the income-tax department to disclose the particulars necessary for determining that issue, and that we, sitting here in appeal, have also such power.

Mr. Govindarajachari further submitted that in view of the careless conduct of the appellants the Court should not call for additional evidence from the income-tax department at this stage in order to assist them to establish their case. As however, we think that it is not satisfactory to decide the question arising under proviso A in the present state of the record with the two contradictory memoranda Exs. P-6 and P-18 granted by the same public officer with reference to the same matter, and require the additional material which we propose to call for under clause (*b*) of rule 27 (1) of Order 41 of the Code of Civil Procedure in order to clear the doubt in our minds, no question of the parties' delay or negligence arises. We accordingly call upon the Income-tax Officer, Masulipatam, to produce the original records relating to the assessment to income-tax, if any, made in 1936-37 and 1937-38 on the defendants' family of which Chapalamadugu Rangayya was the manager. The further hearing of this appeal will await the production of those records.

V.S. *Petition allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD MACMILLAN, LORD DU PARCQ AND SIR JOHN BEAUMONT.

Shankarlal Narayandas Mundade .. *Appellant**

v.

The New Mofussil Co., Ltd., (in liquidation) and others .. *Respondents.*

Contract—Validity of oral contract—Plea that agreement is not complete until execution of formal document—Question of construction—Point cannot be raised for the first time before appellate tribunal.

By the law of India an oral contract is valid and enforceable.

When a party pleads that it was contemplated by the parties that an agreement was not to be considered as complete and binding until it was signed by the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

Such a plea, when not raised either in the written statement or before the trial Judge and in regard to which no evidence was led and which was neither the subject of an issue nor referred to by the Judge in his judgment, cannot fairly be raised for the first time before an appellate tribunal.

Sir Thomas Strangman, K. C., and *S. P. Khambatta* for Appellants.

Andrew Clark, K. C., and *J.M. Parikh* for Respondents.

Their Lordships Judgment was delivered by

LORD DU PARCQ.—In the suit which has given rise to this appeal, the plaintiff (now the appellant) claimed against the defendant company specific performance of an oral agreement made by the company through its Liquidator, Sir Shapurji Bomanji Billimoria, for the sale to the plaintiff of a Pressing and Ginning Factory at Dhulia. He claimed the like relief against the remaining defendants, in accordance with section 27 of the Specific Relief Act, as persons claiming under the defendant company by a title arising subsequently to the contract.

It may be said at once that if the plaintiff is entitled to the relief which he claims against the defendant company, no question arises as to the liability of the other defendants. It is common ground that a contract for the sale to them of the factory was entered into after the date of the contract alleged by the plaintiff, and they made no attempt at the trial to prove that they had paid the purchase money in good faith and without notice of the original contract. Their Lordships have found it unnecessary to examine the evidence which was called on behalf of the plaintiff to show that these defendants in fact had notice of the earlier contract, since a decision of this Board is clear authority for the proposition that the burden of proving good faith and lack of notice lay upon the defendants. (*Bhup Narain Singh* v. *Gokhul Chand Mahton*[1].

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* P.C. Appeal No. 44 of 1943. 13th March, 1946.

1. (1933) 66 M.L.J. 255 ; L.R. 61 I.A. 115 : I.L.R. 13 Pat. 242 (P.C.).

The suit was tried before the First Class Subordinate Judge of Dhulia. An objection was taken to the jurisdiction of the Court. Both the trial Judge and the Judges of the High Court overruled it, and the respondents have not persisted in it. Apart from that objection and from questions as to the relief to which the plaintiff was entitled which are not now the subject of dispute, the case as it was presented to the learned Judge was a simple one. It appeared that the plaintiff had authorised one Nandurdikar, a broker, to buy the factory on his behalf, and, if necessary, to pay as much as Rs. 65,000 for it. The Liquidators of the defendant company were Sir Shapurji Bomanji Billimoria and a Mr. A. M. Kajiji, since deceased, and it was with the former, who undoubtedly had authority to act for the company, that the negotiations were carried on. After some preliminary discussion the negotiations came to a head in a conversation between Sir Shapurji and Nandurdikar at Bombay on the 7th July, 1936. There was little difference between the accounts given by Sir Shapurji and Nandurdikar of what took place on that day. The trial Judge summarises Sir Shapurji's account of the interview as follows :—

He (Nandurdikar) "offered Rs. 62,000 as price of the suit factory. Sir Shapurji declined. Nandurdikar came to his office again on 7th July, 1936, at 4 p.m.; he offered Rs. 63,000 and Sir Shapurji accepted the offer. Sir Shapurji told Nandurdikar that the earnest money was to be Rs. 10,000, that half the costs were to be borne by each party, that the completion period was to be one month and that there were to be other usual terms which are incorporated in agreements by Solicitors. He accepted Nandurdikar's suggestion to pay brokerage at 2 1/2 per cent. Nandurdikar accepted the terms and went to fetch the earnest money. Sir Shapurji called Antia who is a clerk of the Defendant No. 1 Company and told him the terms agreed upon between him and Nandurdikar. He told Antia to take Nandurdikar to Mr. Manekshaw to have the usual agreement drawn up. He told Nandurdikar when he came back to go with Antia. Sir Shapurji left his office at 5-30 p.m. or thereabout. He got a telephone call at his bungalow from Mr. Manekshaw to the effect that the party was offering Rs. 7,000 by way of deposit though he had agreed to pay Rs. 10,000 as earnest. Sir Shapurji agreed to accept Rs. 7,000 on the suggestion of Mr. Manekshaw."

Sir Shapurji's reference to the "usual" agreement is explained by the fac. which is stated in his evidence that fifteen, or more, Pressing and Ginning factoriest owned by the company, had already been sold. The representative of Messrs. Wadia Ghandy & Company who dealt with the company's affairs was a Mr. Manekshaw, a solicitor of long experience, and on receiving instructions from Sir Shapurji this gentleman, in the words of the defendant company's written statement,

"got a draft agreement for sale of the said factory prepared on the same lines on which the other factories belonging to these defendants, had been sold to other purchasers."

According to Nandurdikar, whose evidence was accepted by the Judge, he agreed to all the terms which Manekshaw inserted in the draft agreement. He said, indeed, that both he and Manekshaw initialled one copy of the draft, but this allegation was denied and the learned Judge was left in doubt about it. It is certain, however, that an engrossment was made ready for signature, and that a document prepared by the solicitors and dated the 7th July, was handed to Nandurdikar, which acknowledged the receipt of "Rs. 7,000 as earnest and on account of Rs. 63,000 being the price for the sale of the Pressing and Ginning Factory of the New Mofussil Company, Limited, at Dhulia with the land building machinery and stores in the factory on the terms of the draft agreement prepared this day." Mr. Manekshaw's attempts to explain away the receipt and the engrossment met with no success before the trial Judge. The chief matter of dispute before him was an allegation by the defendant company that Nandurdikar had refused to accept the terms put before him by Manekshaw, and had re-opened the negotiations. It was said that, by reason of his attitude, either the business had never proceeded beyond the stage of negotiation or that, alternatively, after a contract had been concluded it "was re-opened and the parties entered into negotiations afresh, which negotiations did not result in a concluded agreement."

Sir Shapurji himself seems to have had no doubt that there was a concluded agreement. "When" he said "Mr. Manekshaw informed me that the party was haggling about the agreed terms I felt that the party was resiling from the

agreement." The plaintiff had alleged an agreement "in terms of the said draft agreement and the engrossment thereof." The trial Judge found that this agreement had been proved, and that "the agreement was not re-opened." In their Lordships' opinion these findings of fact were amply supported by the evidence, and counsel for the respondents abandoned the contention that the agreement (if made) had been re-opened. Sir Shapurji's own evidence was to the effect that he offered to sell the factory on terms which, as to the more important of them, were stated by himself and, as to minor details, were left to be settled by Mr. Manekshaw. The whole of these terms were orally accepted by Nandurdikar who had full authority from his principal to accept them, and it is manifest from the documents which have already been mentioned that both parties were intending to make a contract.

By the law of India, such an oral contract is valid and enforçeable. It was, however, natural enough that the parties should wish to have their agreement put in writing and drawn up in proper form. An offer by Nandurdikar himself to sign the engrossment which the solicitors had prepared was rejected on the ground that he had acted as broker in the transaction. Eventually, on the 10th July, Manekshaw, apparently after consultation with Sir Shapurji, said that the plaintiff himself must sign. On the 11th July, Nandurdikar called on Manekshaw to inform him that the plaintiff would arrive in Bombay on the 13th, but Manekshaw then said that the negotiations were at an end. Nandurdikar protested against this and when, on the 13th, the plaintiff arrived in Bombay he accompanied Nandurdikar to the solicitor's office and offered to sign. Manekshaw refused to allow him to do so, said that the agreement was broken, and offered to return the earnest money. Sir Shapurji's eagerness to be rid of what at first may have seemed to be a good bargain is perhaps explained by the fact that on the same day, as is now admitted, he had received Rs. 30,000 as earnest money from the company's co-defendants, who had agreed to pay a purchase price of Rs. 1,25,000 for the Dhulia factory and another Pressing and Ginning factory.

It might well be supposed that on these facts, about which there was no serious difference of opinion between the trial Judge and the High Court, no question of law could arise. By their Memorandum of Appeal, however, the defendants for the first time raised a point which, in the result, found favour with the learned Judges of the High Court. "The learned Judge," it was submitted, "omitted to notice that it was contemplated by the parties that the agreement was not to be considered as complete and binding until it was signed by the parties. He ought to have held that there was no complete agreement as no such agreement was signed by the parties." In the High Court, the long series of cases which deal with transactions in which the parties have contemplated the execution of a formal contract was reviewed at length. In such cases, as was said by Parker, J. (as he then was), "it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through." (*Von Hatzfeldt-Wildenburg* v. *Alexander*[1].) The learned Judges of the High Court (Broomfield and Divatia, JJ.), though they were in substantial agreement with the findings of fact of the trial Judge, came to the conclusion, in the words of Broomfield, J., that "Sir Shapurji accepted Nandurdikar's offer subject to the execution of a written agreement and that Nandurdikar acquiesced." "Every item in the plaintiff's case might be conceded," said the learned Judge, "and he would still not be entitled to specific performance." The question to be decided was, in his opinion, "whether, a draft agreement and engrossment being evidently contemplated by the parties, the contract can be said to be complete without the formal agreement being signed and executed." Divatia, J., in a concurring judgment, held that "the further contract was a term of the bargain and not merely an expression of desire."

The conclusion come to by the High Court may be expressed in one or other of two ways. It may be said either that there was never a contract between the

1. (1912) 1 Ch. 284 at p. 289.

parties because they did not intend to be bound until an agreement had been drawn up in writing and executed, or alternatively, that there was a contract one term of which was that the parties should join in executing a written instrument embodying its terms and that until such an instrument had been executed the contract should not be enforceable. Both these alternative submissions were made to their Lordships in the very able argument of the respondents' counsel. In whichever way the point is put, their Lordships regard it as open to the objection that it could not fairly be raised for the first time before an appellate tribunal. The submission was not made to the trial Judge in either of its forms. There is no trace of it in the Written Statements of the defendants. It was not the subject of an issue. The Judge does not refer to it in his judgment. No evidence was led with regard to it. If it is to be regarded as founded on the omission of the plaintiff to execute the written agreement, it is not surprising that it was not relied on at the trial by a defendant who had refused to allow the plaintiff to sign although he was ready and willing to do so.

But apart from the objection that the point was taken too late, their Lordships, with all due respect for the Judges of the High Court, are satisfied that it is without substance. In their Lordships' opinion, the facts do not support the inference that the parties intended to be bound only when a formal agreement had been executed. On the contrary their Lordships consider that there was ample evidence to prove that both parties intended to make, and believed that they had made, a binding oral agreement. Their desire and intention to put that agreement into formal shape does not affect its validity.

It was contended by counsel for the respondents that the agreement was necessarily incomplete because it had been left to the solicitors to settle some of its terms and because (as counsel rightly submitted) a solicitor has no implied authority to make a contract on his client's behalf. Their Lordships are of opinion, however, that no question as to a solicitor's implied authority arises in this case. In their Lordships' view, it is a fair inference from the evidence that Sir Shapurji authorised Mr. Manekshaw to put before the plaintiff for his acceptance the "usual" terms. In the circumstances which have already been explained, this seems to their Lordships to have been a very natural and businesslike course for Sir Shapurji to take, and necessarily resulted, when the appellant accepted the terms, in the formation of a binding contract.

For these reasons, their Lordships will humbly advise His Majesty that the appeal should be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The defendants must pay the plaintiff's costs of the appeal and in the High Court.

Solicitors for Appellant : *Hy. S. L. Polak and Co.*

Solicitors for Respondents : *Stanley Johnson and Allen.*

H.J.U./V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE SHAHABUDDIN.

The Official Receiver of Ramnad at Madura .. *Appellant**

v.

Lakshmanan Chettiar and another .. *Respondents.*

*Hindu Law—Custom—Nattukottai Chetty community—*Stridhanam *of bride invested with her husband —Nature of interest of her children in it—Husband if debtor or trustee.*

In the Nattukottai Chetty community the children do not have a joint interest with the mother in the *stridhanam* fund given to her on marriage. The mother is solely entitled to the fund and where

*A.A.A.O. No. 5 of 1945. 17th April, 1946.

she lends the money to her husband it cannot be said that it is constituted a trust fund for the benefit of her children which can be claimed as such, on the insolvency of her husband. The insolvent must be regarded as merely a debtor of the wife and not as a trustee for the children.

Case-law discussed.

Appeal against the order of the District Court of Ramnad at Madura, dated 30th November, 1943, and made in C. M. A. No. 63 of 1942 (I. A. No. 61 of 1939, in I. P. No. 11 of 1932, Sub-Court, Devakotta).

K. Bashyam and *R. Viswanathan* for Appellant.

R. Gopalaswami Ayyangar and *P. Mrithyunjaya Ayyar* for Respondents.

The Judgment of the Court was delivered by

Shahabuddin, J.—This civil miscellaneous second appeal arises out of an interlocutory application filed in the Court of Subordinate Judge of Devakotta by one Valliammai Achi in the insolvency proceedings relating to her husband Muthiah Chettiar. Her case was that a sum of Rs. 14,000 given to her at her wedding was handed over to her father-in-law in accordance with the custom prevalant in her community—the Nattukottai Chetti community—that this amount was invested by her father-in-law in K. M. A. L. A. and other firms for her benefit and after his death her husband withdrew the amount and its interest and invested the same in A.M. firm which he started in Singapore and that the amount at the time of her application had accumulated to Rs. 1,62,362-6-0. This money, she contended, was held by her husband, the insolvent, for her benefit and therefore she should be given a first charge on his entire assets. Before filing this petition she had filed an application as an ordinary creditor of her husband. That application she did not press and it was therefore dismissed. The Official Receiver in opposing the application under appeal did not admit that Valliammai Achi was given Rs. 14,000 at her wedding or that that amount was invested by her father-in-law for her benefit. He contended that even if there was such an investment it did not remain as trust money but that Valliammai Achi lent it to the insolvent to start the A. M. business and that therefore he stood in the position of a debtor and not a trustee. The learned Subordinate Judge accepted the case of Valliammai Achi with regard to the deposit made with her father-in-law and the investment by him in other firms but he doubted if he acted as a trustee in doing so. He however held that the insolvent took the amount from his wife as a loan. On the question of the charge he came to the conclusion that even if it were assumed that the insolvent was a trustee in respect of the amount in question there was no evidence connecting the property in respect of which the charge was claimed with the assets of the A. M. firm, and that unless the properties were traced to the assets of that firm, Valliammai Achi was not entitled to the charge claimed by her. He therefore held that Valliammai Achi was entitled to claim the amount as an ordinary creditor. On appeal the learned District Judge took the view that the amount claimed by the petitioner, constituted a trust fund. It was contended before him that in view of this conclusion a charge should be created over the entire assets on the basis that in Nattukottai Chetti families which are trading families the entire assets should be regarded as trade assets. The learned Judge did not accept this contention as A. M. firm was not ancestral business, but he came to the conclusion that the insolvent constructed a bungalow and acquired two sites with the assets of the A. M. firm and therefore gave the present first respondent, one of the sons of Valliammai Achi who had come on record as her legal representative—she having died after the appeal was filed, a charge in respect of these properties. The second respondent, another son of Valliammai Achi was declared an insolvent and his interest vested in the Official Receiver, Ramnad. This appeal has been filed by the Official Receiver, while the first respondent has filed a memorandum of cross-objections contending that he should have been granted a charge over the entire assets of his father.

That a sum of Rs. 14,000 was given to Valliammai Achi at her wedding and that this amount was handed over to her father-in-law who invested it from time

to time in several firms is not disputed ; nor is there any controversy with regard to the actual amount due to her. The finding of the learned District Judge that the amount of Rs. 14,000 at the inception constituted a trust fund is not contested ; but it is argued that his conclusion that the amount retained the character of a trust fund even after it was brought into the A. M. firm is not correct. It is contended that the insolvent borrowed the money from Valliammai Achi when he started the A. M. firm and was therefore a debtor and not a trustee. Alternatively it is argued that assuming it was a trust fund even after it was taken into the A. M. business at Singapore, Valliammai was not entitled to a charge over the properties over which a charge has been created, as those properties have not been traced to the assets of the A. M. firm.

The learned District Judge has not discussed the evidence in this case as fully as he should have done. It cannot however be said that he has not discussed the evidence at all ; but it appears to us on a full consideration of all the material evidence on record that his conclusions cannot be upheld and that both the contentions of the appellant have to prevail.

The evidence with regard to the custom in the Nattukottai Chetti community in respect of the amounts given to the bride has been given by the insolvent who was examined as P. W. 6. He deposed as follows :

> "It is given to the head of the bridegroom family, that is the bridegroom's father who would credit it in the name of the bridegroom who has no right to the money, but only can manage it. The bridegroom's father has no right to the money, and is bound to account for it to the bride. If the father of the husband dies, then the husband keeps it safe for the wife."

It is not disputed that in accordance with this custom, the amount in question was invested in the name of the insolvent himself before it was transferred to the A. M. firm. But Ex. A shows that the amount when taken into the A.M. firm was credited in the name of Valliammai Achi. This is a significant departure from the practice spoken to by the insolvent, and it is contended on behalf of the appellant that this indicates that at that stage the amount was borrowed from Valliammai Achi for starting the A. M. firm and therefore ceased to be a trust fund even if it had till then retained that character. On behalf of the respondent the description of the amount in Ex. A as *stridhanam* money of Valliammai Achi received from A. L. A. firm is strongly relied upon as indicating that the money was taken into the A. M. firm as a trust fund. In our opinion the entry that the amount was the *stridhanam* of Valliammai Achi is only descriptive, and the importance of the account is that it was opened in the A. M. books in the name of Valliammai Achi and not in the name of the insolvent. It is stated in the interlocutory application under appeal that the practice in recent years has been to keep the amount in the name of the bride also, but A. M. firm was not started in recent years. In any case this statement regarding the recent custom does not find any support in the evidence. The insolvent who spoke to the custom does not say that in recent years the practice has been to invest the amount in the name of the wife. It is not contended before us that there has been any such recent custom. Admittedly there was no instrument of trust. It is only on custom that the contention that *stridhanam* amounts invested in the name of the husband constituted a trust fund is based. In these circumstances, a departure from that custom such as is found in Ex. A is a strong indication that the fund changed its character when it came into the hands of the A. M. firm. The insolvent no doubt deposed that he managed the *stridhanam* money of his wife and that when he took it from the A.L.A. firm into the A. M. firm he did not take the consent of Valliammai Achi, indicating thereby that he continued to treat it in the manner in which it was treated prior to his starting the A. M. firm, but in an earlier stage of the insolvency proceedings he had deposed before the Official Receiver that he did not know if the petitioner had any moneys other than those received as her *stridhanam* and that he never managed her moneys but his son and son-in-law managed them. He also deposed that he had borrowed from his wife and that she lent him money from her *stridhanam*. When his attention was drawn to this evidence he denied having made

those statements, an explanation which is hardly acceptable. In her petition which she first filed but did not press, Valliammai Achi treated this amount as having been lent to her husband. This is clear from the following statement in her affidavit accompanying that petition :

"The *stridhanam* amounts were credited in the said A. M. firm in my name as for 17th Arpasi, Sukla. The insolvent owes me in that respect Rs. 46,790-15-6 ringhis and the same at the exchange rate of Rs. 155 came to Rs. 72,526. The same will also be borne from the accounts that have been filed by the insolvent in this Court. The insolvent also undertook to pay interest on the aforementioned amount deposited with him at 12 annas per cent. per mensem for 12 months thavanai".

In her evidence in support of her first application she stated that she had deposited her *stridhanam* amounts with the insolvent. The entry in Ex. A considered with these statements of the insolvent and Valliammai Achi, specially the statement that the insolvent undertook to pay interest at a fixed rate, makes the conclusion irresistible that the amount was taken into the A. M. firm as a loan from Valliammai Achi.

It is then argued on behalf of the respondent that according to the custom in this community, the trust created by the deposits made at the time of the marriage enures to the advantage of not only the bride but also of the children to be born of the marriage, that even if it is considered that Valliammai agreed to her husband utilising the amount for starting a business it would amount only to the beneficiary consenting to an investment to be made by the trustee, and that at any rate as far as her children were concerned, the trust continued and therefore the money did not lose the character of a trust fund even when the insolvent borrowed it. In support of this contention reliance is placed on in Re *Dixon* : *Heynes* v. *Dixon*[1]. In our opinion there is no force in this contention and this decision does not apply to the facts under consideration. In Re *Dixon* : *Heynes* v. *Dixon*[1], the amount had been settled on the wife by a marriage settlement in pursuance of which she was entitled only to the income. The trustee lent it to the husband with the consent of the wife. It was held that as the husband took with full notice that the money lent was trust money he was in the position of an express trustee. But the deposit of the *stridhanam* amount cannot be considered to be a marriage settlement especially when according to the evidence of the insolvent the bride appears to be the sole beneficiary. The insolvent has deposed that the bridegroom's father has no right to the money and is bound to account for it to the bride. In the petition under appeal it is not alleged that the money handed over to the husband's family constituted a trust for the benefit of the children. On the other hand, the case set out there is that the amount was handed over to the husband's family to be invested and improved for the benefit of the bride. Reference is then made to *Palaniappa Chettiar* v. *Nachiappa Chettiar*[2], *Official Assignee of Madra*, v. *Muthayee Achi*[3] and *Muthuraman Chetti* v. *Periannan Chettiar*[4], where observation that the *stridhanam* of the bride invested in the bridgroom's name constitutes a trust fund for the bride and the children to be born of the marriage have been made ; but in these cases, the question as to the rights *inter se* between the mother and her children did not arise. In the *Official Receiver of South Arcot* v. *Kulandaivelan Chettiar*[5], relied on by the appellant the question came up for decision and the learned Judges after examining the Bench decision in the *Official Assignee of Madras* v. *Muthayee Achi*[3], as well as the records of that case observed that that decision could only be taken to have meant that the fund would, in the ordinary course, enure to the advantage of the mother, as well as her children, the beneficiaries taking not jointly but successively. As regards the other two decisions the learned Judges observed as follows :

"In none of them did any question arise as to the rights *inter se* between the mother and her children. General language used as to the *stridhanam* fund being intended for the benefit of the

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1. (1900) 2 Ch. D. 561.
2. (1941) 2 M.L.J. 558.
3. (1937) M.W.N. 493.
4. (1934) 67 M.L.J. 317.
5. (1946) 1 M.L.J. 31.

bride and the children to be born of the union is not inconsistent with the mother taking as the sole beneficiary and her sons or daughters, as the case may be, succeeding her as her heirs."

They took the view that in the Nattukottai Chetty community the children did not have a joint interest with the mother in the *stridhanam* fund. In this view, with which we respectfully agree, Valliammai Achi at the time at which the money was taken by the insolvent into A. M. firm was solely entitled to it, and as from the circumstances stated above it is clear that she lent the money to the insolvent, it cannot be said that the amount continued in the A.M. firm as a trust fund for the benefit of her children. It is significant that the first application and the one under appeal were filed by Valliammai Achi alone and her son came on record only as her legal representative. We therefore consider that the learned Subordinate Judge rightly regarded the insolvent as a debtor of and not a trustee for Valliammai.

Even if it is assumed for argument's sake that the amount when it was invested in A. M. firm was a trust fund, we fail to see how that would entitle Valliammai to a charge on all the assets of the insolvent. There can be no presumption that when a trustee makes his own monies with the trust fund, he misappropriates the latter. There is no doubt an allegation in the petition under appeal that the insolvent committed breach of trust, but no particulars of the alleged breach of trust are mentioned. Nor has it been proved that the insolvent committed any breach of trust. In the circumstances a charge can be created only over those properties which have been traced to the funds of the A. M. firm. The learned District Judge concluded that the bungalow and the two sites over which he created a charge were acquired with the money of the A. M. firm because he considered that it was probable that they were so acquired and the insolvent deposed that he acquired them with that money. But his earlier deposition was to the effect that he had acquired these properties with his own money earned by him as an agent of another firm before the A. M. firm was started. The insolvent explained that that statement was incorrect but that explanation is not worthy of acceptance. We have not been referred to any account specifically tracing these properties to the funds of the A. M. firm; nor have the sale deeds under which the sites were acquired by the insolvent been produced. We therefore consider that these properties have not been traced to the funds of the A. M. firm and that the charge created by the learned District Judge cannot be upheld. The order of the District Judge is set aside and that of the Subordinate Judge restored.

The appeal is therefore allowed with costs in this Court and the lower appellate Court. The memorandum of cross-objections is dismissed with costs.

V.S. —— .. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI.

Edavalath Cherunni *alias* Pennukutty Amma and another .. *Appellants**

v.

Maramittath Therwil Mootha Chettiar Veetil Kelu .. *Respondent.*

Madras Agriculturists' Relief Act (*IV of* 1938), *section* 19, *Proviso—Applicability—Decree for arrears of rent and costs—Part payment—Sale for the balance—Act taking effect subsequent to sale—Application to scale down—Maintainability—Rent whether constitutes debt—Scaling down regarding costs of suit.*

The respondent obtained a decree for arrears of rent and interest due under a kaichit executed before the Madras Agriculturists' Relief Act was passed. The appellants paid a certain amount towards the decree and for the balance the properties were sold in November, 1937. After the Act was passed the sale was set aside on an application under section 23. Thereupon the appellants applied for relief under section 15 of the Act and deposited the rent due for faslis 1346 and 1347. The amounts deposited were found to be correct and full satisfaction of the rents was granted. The appellants then filed an application under section 19 of the Act praying that the entire arrears of rent due under the decree should be scaled down and that the amount paid by them towards the decree before the commencement of the Act should be adjusted towards the costs payable under the decree under the proviso to that section.

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* A. A. A.O. No. 86 of 1945. 12th April, 1946.

Held, that the decree for arrears of rent was not "a decree for repayment of debt" within the meaning of section 19 of the Act.

Held further, that the costs of the suit were not in any sense borrowed by the unsuccessful party, that the proviso to section 19 of the Act was inapplicable to the case and that the appellants could not therefore claim to have their payment adjusted first in payment of the costs awarded under the decree.

Appeal against the order of the District Court, South Malabar, dated 24th July, 1944, in A.S. No. 87 of 1944 preferred against the order of the Court of the District Munsiff, Calicut, dated 9th December, 1943, in I.A. No. 136 of 1942 in O. S. No. 1042 of 1934.

D. A. Krishna Variar for Appellants.

S. Venkatachala Sastri for Respondent.

The Court delivered the following

JUDGMENT.—In this case the respondent obtained a decree for arrears of rent and interest due under a kaichit dated 9th May, 1927, before the Madras Agriculturists' Relief Act was passed. The appellant paid a sum of Rs. 170 towards the decree and for the balance the properties were brought to sale and actually sold in November, 1937. After the Act was passed a petition to set aside the sale was filed under section 23. The sale was accordingly set aside. Thereupon the appellant applied for relief under section 15 of the Act, by means of two petitions depositing separately the rent due for faslis 1346 and 1347 respectively. The amounts deposited were found to be correct and the prayers in those petitions, namely, that the amounts deposited should be accepted in full satisfaction of the rents due in respect of the two faslis, were granted. The appellants then filed the petition out of which the present appeal arises under section 19 of the Act, praying that the entire arrears of rent due under the decree should be scaled down and that the amount of Rs. 170 paid by them towards the decree before the commencement of the Act should be adjusted towards the costs payable under the decree under the proviso to that section. The District Munsiff allowed the petition and recorded satisfaction of the entire decree except as to the execution costs which were not covered by the previous payments. On appeal to the District Court by the decree-holder the learned District Judge held that the proviso to section 19 was not applicable to the case as the decree in question was not a decree for *repayment* of a debt within the meaning of that section and that therefore the sum of Rs. 170 paid by the appellants before the commencement of the Act could not be adjusted towards costs awarded under the decree. He therefore dismissed the petition filed by the appellants under section 19 and this appeal has been preferred from the said order.

It is argued for the appellants that according to the decision in *Venkata Rajagopala Krishna Yachendra Bahadur Varu* v. *Venkata Seshacharlu*[1], even decrees for rent are liable to be scaled down under section 19 of the Act and that therefore the proviso to that section applies to such cases. I am unable to accept this contention which proceeds upon a misapprehension of the decision referred to above. All that was held in that case was that when a decree had been passed for rent, a procedure analogous to that laid down under section 19 of the Act should be followed with reference to such decrees, as no procedure is laid down in the Act for scaling down amounts due under decrees for rent. This does not mean that a decree for arrears of rent is a decree for *repayment* of a debt for which alone provision is made under section 19 of the Act. The definition of "debt" in section 3, clause (*iii*) excludes "rent" as defined in clause (*iv*) and a decree for arrears of rent cannot therefore be a decree for *repayment* of debt within the meaning of section 19. It is suggested that so far as the portion of the decree awarding costs is concerned it may be viewed as a decree for *repayment* of debt. But, as pointed out by the learned District Judge, though such portion might be regarded in a sense as a decree for *payment* of debt it cannot be regarded as one for *repayment* of debt, for *repayment* clearly implies a prior borrowing. It cannot be said that

1. (1941) 2 M.L.J. 655.

the costs of a suit awarded under a decree were in any sense borrowed by the unsuccessful party. It follows that proviso to section 19 is inapplicable to the present case and the appellants cannot claim to have the payment of Rs. 170 adjusted first in payment of the costs awarded under the decree.

It is pointed out that the learned District Judge has erroneously dismissed the petition altogether. The petition prayed not only for the adjustment towards the payment of costs as aforesaid but also for recording satisfaction of the decree in respect of the arrears of rent found due. The appellants' petition should not therefore have been dismissed *in toto*. As deposits made by them for faslis 1346 and 1347 have been accepted as correct the petitioners are entitled to have the decree for arrears of rent discharged, except in regard to costs. The decree of the Court below will be modified accordingly. As the appellants have failed on the main point, they will pay the costs of the respondent.

Leave to appeal is refused.

B.V.V. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

T. G. Annamalai Chettiar and others .. *Appellants**

v.

Kuttigan *alias* Muniyappa Naidu and others .. *Respondents.*

Madras Estates Land Act (I of 1908), section 140—Scope—Suit to recover costs of repairs to a tank from desabandam *inamdar by a person who incurred them in accordance with the requisition of the Collector under the Railway Protection Act, section 14—Jurisdiction of Civil Court.*

The plaintiffs brought a suit for the recovery of the costs incurred by them in executing certain repairs to a *desabandam* tank in accordance with the requisition of the Collector under the Railways Protection Act, section 14, from the *desabandam* inamdars who were under an obligation to keep the tank in good repair, so that the ayacut under it might be properly irrigated. On a contention that the Civil Court had no jurisdiction to go into such a claim,

Held, there is nothing in sections 140 and 189 of the Madras Estates Land Act to bar the cognizance of such a claim by the Civil Courts. Such a claim is outside the scope of the Madras Estates Land Act.

Appeal against the decree of the Court of the District Judge, North Arcot at Vellore in A. S. No. 382 of 1944, preferred against the decree of the Court of the District Munsiff, Tirupathur, in O. S. No. 465 of 1940.

Ch. Raghava Rao for Appellants.

T. L. Venkatarama Aiyar and *G. R. Jagadisan* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs, who are the appellants in this second appeal, brought a suit for the recovery of the costs incurred by them in executing certain repairs to a *desabandam* tank in accordance with the requisition of the Collector under the Railway Protection Act. The defendants are the *desabandam* inamdars, under an obligation to keep the tank in good repair, so that the ayacut under it might be properly irrigated. The amount of the claim is Rs. 1,081, of which Rs. 1,030 is the cost of execution of the repairs and the balance represents interest at 12 per cent. per annum from 16th August, 1939, till the date of plaint.

The defendants pleaded that the repairs carried out by the plaintiffs were not repairs which they were under any obligation to effect and that consequently, if the plaintiffs, in compliance with the orders of the Collector, carried out the repairs, they must be deemed to have done so voluntarily. They also urged that the Civil Court had no jurisdiction to go into this claim.

The District Munsiff decreed the suit overruling the plea raised in bar of the Civil Court's jurisdiction and holding that the repairs which the plaintiffs effected

* S. A. No. 1468 of 1945. 8th July, 1946.

were really repairs that the *dasabandam* inamdars were under an obligation to carry out.

On appeal, the District Judge of North Arcot reversed this decision and dismissed the plaintiffs' suit. He took the view that the Civil Court had no jurisdiction and that as regards the repairs themselves, they were in the nature of extraordinary repairs which the inamdars were under no obligation to carry out to the tank in question. With reference to one item, namely, the cost necessary to strengthen the bund so that the sunken portion might be set right, he was inclined to hold that the work fell within the scope of the duties of the *dasabandam* inamdar, but having regard to his finding on the question of jurisdiction, the plaintiffs were not allowed any relief even in respect of this item.

The question of jurisdiction is free from diffiuclty. The learned Judge went wrong in holding that there was anything in sections 140 and 189 of the Madras Estates Land Act to bar the cognizance of such a claim by the Civil Courts. It is true that section 140 speaks of the obligation of the holder of a *dasabandam* inam to maintain the irrigation work in good repair, but the provisions of this section will get attracted only on the fulfilment of the requisites or the conditions laid down in the previous sections, particularly 136 (*c*), 136 (*d*) and 138. The jurisdiction of the Civil Court is ousted only as regards any dispute or matter in respect of which suits or applications might be brought or made of the nature specified in Parts A and B of the schedule to the Act. We are not for the present concerned with Part A. Part B refers to applications under sections 137, 137 (*a*), 137 (*c*) and 138 (serial No. 30 to 37). It is only with reference to these applications that the jurisdiction of the Civil Courts is ousted. Here we have cases where a creditor claims to recover from a *dasabandam* inamdar the cost of repairs which he was called upon to execute by the Collector who took action under section 14 of the Railways Protection Act. Such a claim is outside the scope of the Madras Estates Land Act. Section 140 applies only to suits brought under the circumstances specified in the prior sections of the chapter.

It will be seen from the report of the Executive Engineer and the plans and the estimates drawn and prepared by him that it was considered necessary, apparently for the proper protection of the railway line going near the bund of the tank in question, that the bye-wash or surplus weir should be widened by 44 and 50 feet to the left and right sides of the existing position and that in this connection a sum of Rs. 790 was the expenditure to be incurred. This surely is not a repair which the *dasabandam* inamdars are under an obligation to undertake. Their legal duty is to maintain the tank in good condition of repair to serve the purposes for which it came into existence, and they cannot be called upon to undertake anything more because the railway line has come into the picture later and requires to be protected adequately against a possible breach of the tank. In Ex. P-10 and P-11, we get an idea of the repairs that were considered necessary and the cost that had to be incurred in respect of each item. The learned Judge was right in holding that the defendants should be saddled with the cost of the earth work to be done for strengthening the bund in portions so that it might be brought into a standard condition as per " the approved memoir". Any high ground that had formed in front of the escape from the weir and which would have impeded the normal overflow of the surplus water of the tank would also have to be removed by the inamdars as otherwise water which should flow over would collect in the tank, to the prejudice of its safety and may prove the cause for its breach, causing damage to all parties concerned—the mittadar, the inamdars who hold the lands in the ayacut, the other ayacutdars and the railway authorities also. The expenses relating to those items have to be allowed in the plaintiffs' favour, and they are made of five sums of Rs. 55, 20, 26, 35 and 61, making a total of Rs. 197, as would be seen from Ex. P-7. We have to add to this a centage charge of 14 per cent. Thus the defendants are liable for a sum of Rs. 225 in all; and for this sum they would be liable under section 69 or 70 of the Contract Act. The remaining portion of the claim against them has to stand rejected.

The second appeal is therefore allowed in part and the plaintiffs will have a decree for Rs. 225 only together with interest at six percent from 16th August, 1939, when the repairs were effected till the date of payment. The parties will pay and receive proportionate costs throughout. (No leave).

K.S. —— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Vastiram Manmal and Co., by its manager, Manmal .. *Appellant**

v.

T. S. Ramaswamy Iyer and Brothers Ltd. .. *Respondent.*

Civil Procedure Code (V of 1908), sections 20 and 21—Place of suing—Suit in respect of contract—Terms of business—Condition regarding forum—Strict construction.

Where one of the conditions of the business was that any legal proceedings in respect of or arising out of the contract should be instituted in the Madras Courts, but in respect of the suit transaction there was no completed contract but merely an offer from one side,

Held, that the condition as to place of suing did not apply. When parties enter into an agreement restricting their rights to institute suits except in particular courts it must be strictly proved that the restriction applies to the particular proceeding instituted.

Appeal against the order of the District Court of Bellary, dated 30th August, 1945, in A.S. No. 59 of 1944 (O.S. No. 401 of 1943, District Munsiff Court, Bellary).

K. Srinivasa Rao for Appellant.

B. C. Seshachala Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The appellant filed a suit for the recovery of a sum of money, being the total of the sums advanced by him to the defendant's agent and for incidental expenses, on the ground that he had made an offer to the defendant which had been cancelled before it was accepted and that he was therefore entitled to the refund of the money advanced by him. The defendant raised the objection that the Bellary District Munsiff, in whose Court the suit was filed, had no jurisdiction to try the case; because the parties had agreed that all disputes arising between them should be decided in the Courts at Madras. The plaintiff admitted that condition No. 10 of a form which he had signed was to the effect that any legal proceedings in respect of or arising out of the contract over-leaf should be instituted in the Madras Courts; but he argued that since the offer had not ripened into a contract, this condition did not apply and that he was therefore entitled to file his suit in any Court having jurisdiction. The District Munsiff went into the question whether there was a completed contract or whether, there was only an offer, and held that there was no completed contract. He then accepted the argument of the plaintiff that condition No. 10 did not apply to offers and decreed the suit. In appeal, the learned Judge did not consider the questions of fact, but held that on a reasonable interpretation of condition No. 10 the parties were bound to have this dispute decided by the Madras Court, whether there was a completed contract or not.

The learned advocate for the appellant has raised three points. The first is that the learned District Judge should not have directed the plaintiff to file his suit in another Court unless, in the terms of section 21 of the Civil Procedure Code, there was a failure of justice on account of the plaintiff's filing it in the wrong Court. The second objection was that the condition No. 10 on the reverse of Ex. P. 1 must be interpreted to mean what it actually says, *i.e.*, that legal proceedings arising out of contracts and contracts alone should be instituted in Madras Courts. Thirdly, he argued that since no part of the cause of action arose in Madras, the stipulation in condition No. 10 was illegal.

*A.A.O. No. 6 of 1946, and C.R.P. No. 11 of 1946. 28th March, 1946.

It is unnecessary for me to express any opinion on the first and third points. Some cases dealing with the first point have been referred to by the learned Counsel for the respondent; but since the matter has not been fully argued and it is sufficient for the disposal of this appeal to consider the second point, I shall not express any opinion on the first point. With regard to the third point, it is argued that since the respondent was resident in Madras a suit could have been brought in the Madras Court and that therefore even if we follow the decision in *Crawley* v. *Luchmee Ram*[1], approved of by Madhavan Nair, J., in *Achratlal Keshvlal Mehta and Co.* v. *Vijiam and Co.*,[2] the Madras Courts would have jurisdiction. As this is a question of fact, it is not desirable that I should express any opinion on that point either.

When parties enter into an agreement restricting their rights to institute suits except in particular courts, it must be strictly proved that the the restriction applies to the proceedings under consideration. It may be true that the respondent was anxious to have all matters arising out of offers as well as contracts decided in Madras Courts for reasons of convenience; but the question is whether the appellant also understood that the restriction applied to offers as well as contracts. In deciding whether this condition prevents the plaintiff from filing a suit in the District Munsiff's Court, we must have regard to the actual wording used. The respondent was not unaware of the distinction between an offer and a contract, as will be evident from the fact that on the reverse of the conditions is a space for noting the number of the offer as well as a space for noting the number of the contract. We must therefore conclude that the parties intended what is stated clearly in the condition itself, namely, that legal proceedings arising out of contracts shall be instituted in the Madras Courts. If so, then the learned District Munsiff was right in holding that if there was only an offer, then the jurisdiction of the Bellary District Munsiff's Court was not ousted.

The appeal is therefore allowed and A.S. No. 59 of 1944 remanded to the District Judge of Bellary for disposal on the merits. The costs of this appeal will be costs in the cause. The civil revision petition does not arise and is dismissed without costs.

B.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Narra Padmavathamma .. *Petitioner.**

Criminal Procedure Code (V of 1898), sections 133 and 136—Preliminary order—Confirmation—Sufficient opportunity to person against whom order is made to show cause against confirmation—Necessity.

Where after making a preliminary order under section 133, Criminal Procedure Code against a lady who observes purdah, the notice was served on her agent who promptly applied for time but it was refused and the preliminary order was made absolute,

Held, that in a matter like this it was essential that the party aggrieved should have sufficient opportunity to meet the charge and as in the circumstances, sufficient opportunity was not given to the person concerned to show cause against the confirmation of the preliminary order, it should be set aside.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate of Chendragiri, dated 27th September, 1945, and made in M.C. No. 50 of 1945.

M. V. Nagaramayya Advocate for the petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

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1. 1 Agra 129.
2. (1925) 49 M.L.J. 189.

* Cr. R. C. No. 1173 of 1945. (Cr. R. P. No. 1089 of 1945). 19th July, 1946.

The Court made the following

ORDER.—This application is to revise an order made by the Joint Magistrate of Chendragiri making absolute a preliminary order under section 133 of the Code of Criminal Procedure.

I am satisfied that sufficient opportunity was not given to the petitioner to show cause against the confirmation of the preliminary order. She is a lady who observes purdha and the notice itself had been served on her agent who promptly applied for time on the ground that notice was too short. Inspite of it the application for time was refused and the preliminary order was made absolute. In a matter like this it is essential that the party aggrieved should have sufficient opportunity to meet the charge.

The order in M. C. No. 50 of 1945, dated 27th September, 1945, is set aside and the joint Magistrate is directed to issue a fresh notice to the petitioner giving her sufficient time and opportunity to meet the case. All proceedings which have been issued on the footing of the order which has been now set aside will stand vacated.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Chuckler Sevuttu Raman .. *Petitioner**

Criminal Procedure Code (*V of* 1898), *section* 341—*Deaf accused—Proper procedure to be followed—Duty of Court.*

Where the medical evidence is that the accused is only slightly deaf, it cannot be said that it is not possible to make the accused know what the proceedings are. Somebody would have to take the trouble to speak to the accused in close range and explain to him what takes place in Court as and when the proceedings go on. Merely because it would be troublesome to do so, is no ground for asking the High Court to pass any orders dispensing with the taking of any efforts to make the accused know what is going on.

Case Referred for the orders of the High Court under section 341, Criminal Procedure Code, by the District Magistrate, North Arcot in his letter, dated 3rd January, 1946.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Accused not represented.

The Court made the following

ORDER.—This is not a case in which the medical evidence indicates that it is not possible to make the accused know what the proceedings are. Of course somebody will have to take the trouble to speak to the accused in close range and explain him what all has taken place in Court as and when the proceedings go on. It is no doubt a difficult job, but then that will have to be done because the person is deaf. It cannot therefore be said that it is a case in which it is not possible to the Magistrate to make the accused understand what is going on in Court. Merely because the Magistrate will have to take some trouble in making the accused know what is going on, I will not be justified in passing any orders dispensing with the taking of any efforts to make the accused know what is going on. The medical evidence, according to the letter of reference, is that the accused person is only *slightly deaf* and there is evidence of one of the witnesses for prosecution who knew him for 15 years that though he is deaf, he could hear when talked to at a close range. The papers are returned to the Magistrate to proceed with the case in the light of the observations made above.

V.S. ——— *Reference answered.*

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*Cr.R.C. No. 6 of 1946. 21st February, 1946.
(Case Referred No. 1. of 1946).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

P. V. Muthuswami Ayyar .. *Petitioner**

v.

A. Velammal .. *Respondent.*

Indian Contract Act (IX of 1872), section 70—Co-owners of an irrigation well—One of the co-sharers doing repairs to the well—Notice of demand for contribution from others towards cost—Refusal—Suit claiming contribution—Facts to be proved to sustain the claim.

The plaintiff-petitioner was the owner of a half share in a common irrigation well which had long been in disuse. As he was in a position to make the necessary expenditure for putting the well into proper repair, he sent notices to the other co-owners for contribution towards the cost of repairs so that they might also benefit by the said repairs. The respondent refused to do anything in the matter. But the work was carried out by the petitioner at his own cost and he thereafter filed a suit for contribution from the respondent, claiming under section 70, Indian Contract Act. On a question whether the claim was sustainable,

Held, that in order to succeed in his claim the plaintiff had to prove (1) that he repaired the well, (2) that he did not intend to do so gratuitously and (3) that the defendant enjoyed the benefits of the repair. Since the respondent was not, as a matter of fact, enjoying the use of water from the well she could not be held liable under section 70 of the Contract Act, though the other facts necessary to sustain a claim under the section had been proved in the case.

Saptharishi Reddiar v. *Secretary of State for India*, (1915) 28 M.L.J. 384 and *Srirama Raja* v. *Secretary of State for India*, (1942) 2 M.L.J. 800 : I.L.R. 1943 Mad. 158 (F.B.) applied.

Viswanatha Vijaya Kumara Bangaroo v. *R. G. Orr*, 45 I.C. 786 held no longer good law.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff, Periakulam, in S.C.S. No. 281 of 1944.

V. Ramaswamy Iyer and *R. M. Halasyam* for Petitioner.

G. R. Jagadisan and *J. R. Alwar Naidu* for Respondent.

The Court delievered the following

JUDGMENT.—The petitioner became the owner of a half share in a well which had long been in disuse. There were two other co-sharers, each of whom had a quarter share in the well. The plaintiff was in a position to make the necessary expenditure to put the well into repair ; and he sent notice to the other two sharers asking them to contribute towards the repair of the well, so that they would all be able to use it and with its water raise a second crop on the land—which they had not been able to do hitherto. One of the sharers whose share was subsequently acquired by the petitioner said that he was not interested in the well because his land was heavily mortgaged. The respondent said that she did not propose doing anything in the matter ; but that if the plaintiff chose to do it she had no objection. The petitioner sent demands to her for payment of contribution before the work was started ; but she did not reply. Later on, while the work was being executed, he sent further notices to which she replied that she could not contribute. The petitioner thereupon completed the work and filed this suit for contribution from the respondent, claiming under section 70 of the Contract Act. The lower Court held that although the respondent stood to benefit by the work and that the petitioner did not intend to do the work gratuitously, yet he found that it could not be said that the petitioner did the work " for the respondent." He therefore dismissed the suit.

The argument of the learned District Munsiff is supported by some observations in *Viswanatha Vijaya Kumara Bangaroo* v. *R. G. Orr*[1], to this effect :

" Section 70 of the Contract Act does not apply to cases where a person does an act for his own benefit and that act incidentally benefits his neighbour or any other person. In such cases the latter need not pay for the extent of the benefit derived by him from the act.

A person claiming contribution from another under section 70 of the Contract Act must prove that he did some act *for* the latter. An act cannot be described as done by one person for another, unless it can be shown that, but for the existence of that other's interest, it would not have been done."

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*C. R. P. No. 609 of 1945. . 18th July, 1946.

1. (1917) 45 I.C. 786.

It was held that the repairs had been executed by the plaintiffs in that case mainly for their own benefit, although the defendants were also benefited by them. The suit was, however, dismissed, it being held that although the defendants had benefited, they were not liable under section 70 of the Contract Act. It seems to me that this is no longer good law in view of the Full Bench decision of this Court in *Srirama Raja* v. *Secretary of State for India*.[1] The learned Judges were there considering a claim by the Government from certain Shrotriamdars, who equally with the Government had been enjoying water from a certain tank which the Government had repaired after notice to them. The Shrotriamdars had replied that they had no objection to the execution of the work by the Government; but they objected to making any payment towards it as they had never done so in the past. The learned Judges considered the various Madras cases dealing with the subject and approved entirely of the decision in *Saptharishi Reddiar* v. *Secretary of State for India*[2], a similar case of a claim by the Government to a contribution for the repair of a tank. Both in *Srirama Raja* v. *Secretary of State for India*[1], and *Saptharishi Reddiar* v. *Secretary of State for India*[2], the learned Judges had no doubt that the Government had repaired the tank for the other parties using its water as well as for itself. The learned advocate for the respondent seeks to distinguish between these cases and the present case by pointing out that the Government has certain responsibilities in the matter of keeping tanks in repair and ensuring that all persons entitled to water from the tank shall not be deprived of it by reason of the tank's falling into disrepair. These decisions were not, however, based on the special responsibility of the Secretary of State. The argument accepted was equally applicable to any claim by a co-owner for contribution towards the expenses of the repair of a common irrigation source. Applying that principle to the present case, this well being a joint source of irrigation of the plaintiff and the defendant, the plaintiff would be entitled to sue for contribution from the defendant provided that the other ingredients of section 70 are to be found.

In order that the plaintiff should succeed in the claim under section 70 of the Contract Act he would have to prove (1) that he had repaired the well for the defendant; (2) that he did not intend to do so gratuitously; and (3) that the defendant enjoys the benefit of the repair. I have already held that the petitioner did the work for the respondent. It is clear that he did not do so gratuitously. The only other question for consideration is whether the defendant enjoys the benefit of the work done. In his deposition the plaintiff said—

> "I have provided means for irrigation of the defendant's land with the well water. The baling fixture I use could be employed by her once in four days. Defendant has not yet used the well water for irrigating the land. I told Velammal's (defendant's) lessees that they could take water to her land if she pays her contribution towards the repairs."

The defendant and her lessees are therefore unable at present to take any water from the well, firstly because a picotah and other apparatus would be necessary before they could do so, and also because the plaintiff is not willing and has not been willing to allow the defendant and her lessees to use the water unless they contribute. It cannot be said that the defendant is enjoying the water, merely because she could enjoy it if she chose to spend more money and to pay the contribution that the plaintiff is demanding. It is only after she or her lessees utilise the water from the well that they would be liable under section 70 of the Contract Act.

The defendant was therefore entitled to succeed, although on a different ground from that on which the lower Court dismissed the suit. The petition is dismissed, but in the circumstances without costs.

K.C. ——— *Petition dismissed.*

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1. (1942) 2 M.L.J. 800 : I.L.R. 1943 Mad. 158 (F.B.).
2. (1915) 28 M.L.J. 384.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Palaniswami Chettiar .. *Appellant**

v.

Chitraputhran Chettiar, nearest reversioner and L.R. of deceased plaintiff, appellant in the lower appellate Court—*vide* affidavit of appellant dated 13th July, 1945, filed in Second Appeal, and others .. *Respondents.*

Travancore Nayar Regulation (II of 1100), section 8 (1)—Marriage of non-Nayar with Nayar lady during continuance of a prior marriage—Validity.

A Vellala by caste who had already married a lady of his own caste, married again under the Travancore Nayar Regulation a Nayar lady on 29th November, 1939, during the continuance of the prior marriage. On a question as to the validity of the second marriage,

Held, Ex facie sub-section (1) of section 8 of the Travancore Nayar Regulation makes such a marriage as this altogether void as it is a subsequent marriage of a male during the continuance of a prior marriage and was performed after the commencement of the Regulation.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A.S. No. 229 of 1944, preferred against the decree of the District Munsiff's Court of Tenkasi in O.S. No. 238 of 1943.

G. R. Jagadisan for *S. Ramaswami Aiyar* for Appellant.

S. V. Rama Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—Although the case out of which this appeal arises had assumed large dimensions in the Courts below it is here confined to one short point which admits of a brief disposal. Pechiappan Chettiar who belongs to the Vellala caste married at first Arunachalathammal who belonged to his caste. In November, 1939, or thereabouts he is said to have married a Nayar lady by name Gomathi Ammal who is the third defendant in the case. The marriage took place at Travancore and is governed by the Travancore Nayar Regulation (II of 1100). Pechiappan died on 6th January, 1941, leaving no issue and it would appear that Gomathi Ammal was in possession of the property belonging to Pechiappan. Arunachalathammal, the Vellala wife, filed the present suit for a declaration that she is the owner of the entire suit property as the widow of Pechiappan. She also claimed in the alternative that if the third defendant was to be treated as the lawfully married wife of Pechiappan, the plaintiff should be declared to be entitled to a one-half share of the property and the same should be partitioned and she should be given separate possession of her half share. Within less than a month after Pechiappan's death, the third defendant sold away the entire suit property to the first defendant under Ex. D-1 and it is in that right that the first defendant resisted the suit and he is the sole appellant here.

The only question argued in the appeal is whether the alleged marriage of Gomathi Ammal in 1939 was valid and whether any rights accrued to her in respect of the suit property as the lawfully married wife of Pechiappan.

Ex: D-11 is the certified extract from the marriage register and that shows that the marriage took place on 13th April, 1115 (corresponding to 28th November 1939) between Pechiappan and Gomathi Ammal so that the factum of the registration of the marriage cannot be seriously disputed. The only question is whether the marriage is valid under the provisions of the Travancore Nayar Regulation. Sub-section (1) of section 8 of the Regulation reads thus :

"A subsequent marriage of a female or of a male, during the continuance of a prior marriage, and performed after the commencement of this regulation is void."

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*S.A. No. 1477 of 1945. 26th March, 1946.

Sub-section (2) deals with the case of a non-Nayar male marrying in his own caste which marriage is declared to be not void even though he had married a Nayar wife before the commencement of the Regulation. We are not concerned with that sub-section here. *Ex facie* the first sub-section makes such a marriage as this altogether void. This is a subsequent marriage of a male during the continuance of a prior marriage and was performed after the commencement of the Regulation. It is contended for the appellant that, in terms of section 8 (1) itself, the marriage of the third defendant with Pechiappan is not void and three reasons are put forward. The first reason is that according to section 3 of the Regulation all that is required to make a marriage a valid marriage is its open solemnisation and so long as such a thing has been performed, a marriage which is declared to be valid under section 3 cannot be treated as void under section 8. This contention is obviously untenable in view of the explicit language employed in section 8 (1) which must be held to govern the provision in section 3. Section 3 only describes what is required to constitute a valid marriage. Section 8 deals with the specific case of a double marriage and the special provision has to govern the general provision.

The second contention is that according to the language of section 8 (1) the prior marriage also should have been after the commencement of the Regulation. The words employed in section 8 (1) do not yield to this interpretation. The prior marriage may be at any time. It is the subsequent marriage which has to be performed after the commencement of the Regulation.

The last contention is that the subsequent marriage that is referred to in section 8 (1) is a marriage outside the scope of the Nayar Regulation. That too is an interpretation which I cannot accept. On the other hand, a subsequent marriage performed after the commencement of the Regulation can only mean a marriage performed within the scope of the Regulation.

In this view I must affirm the decree of the lower appellate Court and in the result the appeal is dismissed with costs.

No leave.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Nanjappa Goundan .. *Appellant**

v.

Pacha Goundar and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 82—Claim for contribution—Several mortgaged properties—Owner of one item contributing more—Entire mortgage debt not paid—Claim for contribution—Maintainability.

Under section 82 of the Transfer of Property Act it is not necessary that the owner of one of the mortgaged properties should pay the whole of the common debt before he can claim contribution. In such a case where he is obliged to pay more than what is payable from out of his property he is entitled to file a suit for the excess even though the debt is still undischarged.

Ibn Hasan v. *Brijbhukan Saran*, (1904) I.L.R. 26 All. 407 (F.B.) and *Narayanan Chetti* v. *Nallammal*, (1942) 2 M.L.J. 525 : I.L.R. 1943 Mad. 96 (F.B.), considered.

Appeal against the decree of the District Court of Coimbatore in A. S. No. 289 of 1944, preferred against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 118 of 1942.

T. V. Ramanatha Aiyar and *S. Sitarama Aiyar* for Appellant.

T. K. Subramania Pillai for Respondents.

The Court delivered the following

JUDGMENT.—The sixth defendant is the appellant in this second appeal. The appeal raises the question of contribution under section 82 of the Transfer of Property

*S.A. No. 1449 of 1945. 15th April 1946.

Act. One Chinna Goundan executed a mortgage for Rs. 9,000 over some immovable properties. He paid a sum of Rs. 4,000 and there was a sum of Rs. 5,000 due. The mortgagee's right was purchased by one Muthuswami Goundan and Muthuswami Goundan filed a suit O. S. No. 205 of 1938 on the file of the Sub-Court at Coimbatore. A mortgage decree was passed. The original mortgagor had been adjudged an insolvent in I.P.No. 180 of 1933, and so the Official Receiver was made a party to Muthuswami's suit O. S. No. 205 of 1938. The plaintiff in the present action had purchased one-fifth share of the original mortgagor Sinna Goundan from the Official Receiver in the year 1935 and was impleaded in that capacity in O. S. No. 205 of 1938. The decree was subsequently scaled down as regards the present plaintiff who was the ninth defendant in that suit. Under that decree as scaled down the ninth defendant therein, the present plaintiff was bound to pay Rs. 5,204-12-0. In E. P. No. 781 of 1941 filed by the decree-holder the plaintiff paid Rs. 5,911-6-0 in full discharge of the amount due from him including costs and interest. The sixth defendant who is the appellant in this Court purchased four-fifth share in the mortgaged properties from the Official Receiver in the year 1942. The plaintiff, first respondent then filed the present suit for contribution under section 82 of the Transfer of Property Act on the ground that his one-fifth share in the mortgage property was liable to contribute only one-fifth share of the mortgage-debt, that he was obliged to pay more than his one-fifth share and that the property purchased by the sixth defendant, namely, four-fifth share of the property was bound to contribute to the extent of four-fifth of the amount paid by him. The appellant is the only contesting defendant. He raised very many defences the chief of which is that the whole of the decree amount in O. S. No. 205 of 1938 has not been paid up and that therefore the first respondent has no right of contribution. There is no doubt that the decree was for Rs. 6,341-12-0 with costs and interest. As regards the present plaintiff who was the ninth defendant in that suit the amount was scaled down to Rs. 5,204-12-0 but as the other defendants were not agriculturists the decree against them for Rs. 6,341-12-0 was left undisturbed. The appellant, the sixth defendant is the successor in interest of the Official Receiver who was a party in the previous suit.

The question for determination is whether under section 82 of the Transfer of Property Act it is necessary that the owner of one of the mortgaged properties should pay the whole of the common debt before he can claim contribution or whether in cases where he is obliged to pay more than what is payable from out of his property he is entitled to file a suit for excess even though the entire debt is still undischarged. On this point the learned advocates have been able to place only two decisions before me. In *Ibn Hasan* v. *Brijbhukan Saran*[1], there was a difference of opinion. Two learned Judges held that unless the entire common debt was paid no question of contribution would arise whereas Banerji, J., held that in order to claim contribution it is not necessary that the whole of the common debt should be discharged. In *Rajah of Vizianagaram by Collector and guardian* v. *Rajah Setrucherla Somasekhararaz*[2], there is an observation by Bashyam Aiyangar, J., in the referring judgment that in order to claim contribution it is not necessary that the entire common debt should be discharged. Though there were several other later decisions in which the decision in *Ibn Hasan* v. *Brijbhukan Saran*[1], has been referred to, the particular question which has arisen in this case did not arise in any of the later cases and therefore it serves no useful purpose to refer to those decisions.

There are certain observations of the learned Chief Justice in the leading judgment in *Narayanan Chetti* v. *Nallammal*[3], which are useful. In that case there was a second mortgage of some of the properties covered by the first mortgage and these properties were sold and the first mortgage discharged but there was not enough to pay the second mortgage. A suit for contribution was filed by the second mortgagee against the owner of the other properties not

1. (1904) I.L.R. 26 All. 407 (F.B.).
2. (1900) 13 M.L.J. 83 : I.L.R. 26 Mad. 686 at 687 (F.B.).
3. (1942) 2 M.L.J. 525 : I.L.R. 1943 Mad. 96 (F.B.).

mortgaged to him and not sold in discharge of the prior mortgage. In *Sesha Ayyar* v. *Krishna Ayyangar*[1], it was decided that in such circumstances the plaintiff, second mortgagee was not entitled to contribution and hence the matter was referred to a Full Bench. The leading judgment was delivered by the learned Chief Justice and the decision in *Sesha Ayyar* v. *Krishna Ayyangar*[1], was overruled. In dealing with this question the learned Chief Justice said :

> "The governing factor here is what section 82 of the Transfer of Property Act says, and the learned Judges who decided *Sesha Ayyar* v. *Krishna Ayyangar*[1] had not sufficient regard to its wording. That decision, if allowed to stand, would mean that persons in the position of the plaintiffs would lose everything unless they were sufficiently well off to discharge the prior mortgage. It would not only be most unjust, but it would mean inserting into the section a provision which is not there and a provision which runs counter to its tenor."

Turning to the Transfer of Property Act, there are two sections 82 and 92. In providing for the right of subrogation the legislature has in section 92 taken care to provide that the right of subrogation does not arise unless the mortgage in respect of which the right is claimed has been redeemed in full. It is significant that there is no such provision in section 82. It is not permissible for us, as the learned Chief Justice pointed out, to read into section 82 words which are not there. I may also adopt the other reasoning of the learned Chief Justice that if this argument of the appellant is allowed to prevail, persons in the position of the plaintiffs would lose everything unless they were sufficiently well off to discharge the prior mortgage in its entirety. Such a construction is to be avoided if possible and having regard to the difference in language in sections 82 and 92 it seems to me to be reasonable to hold that it is not necessary that the whole of the common mortgage should be discharged before a claim for contribution can be made by the person who has been obliged to pay more than what he is liable to contribute towards the common mortgage.

The case can also be disposed of on another point. So far as the appellant and the first respondent are concerned they can be said to be jointly liable only to the extent of Rs. 5,204-12-0 which was the amount payable by plaintiff as scaled down. Both the appellant and the first respondent are jointly liable to the extent of Rs. 5,204-12-0 and the appellant is solely liable for the balance of the decree amount in O. S. No. 205 of 1938. So the common liability has been fully discharged. A similar view was taken by Venkataramana Rao, J., in *Sreeramulu* v. *Ramakrishnayya*[2]. There in a mortgage suit Lakshmayya and the fourth defendant were made liable to pay Rs. 2,302-1-11 and the balance of Rs. 895-15-7 was made payable by Lakshmayya separately. Rs. 2,302-1-11 was paid by the fourth defendant but the balance was not paid. The question arose whether the fourth defendant had no right to claim contribution for the reason that the entire mortgage debt was not paid. The learned Judge held that there was a common mortgage debt to the extent of Rs. 2,302-1-11 only and that the whole of the common mortgage was paid by the fourth defendant. In this view the learned Judge held that the fourth defendant could exercise his right to contribution. In this view the first respondent can claim contribution.

It was then said that the sale by the Official Receiver was free of all encumbrances and that the plaintiff consented to it. Reliance is placed on the fact that the appellant paid as much as Rs. 7,225, for the four-fifth share of the properties. But on a reference to the sale deed executed by the Official Receiver it does not appear that there was any stipulation that the sale was free from prior encumbrances. There is no reliable evidence to show that the Official Receiver actually sold the property free of encumbrances. If that were so it would clearly have been stated so in the document and the plaintiff's attestation would have been secured to bind him.

The second appeal fails and is dismissed with costs.

Leave to appeal is refused.

B.V.V. ——— *Appeal dismissed.*

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1. (1900) 10 M.L.J. 383 : I.L.R. 24 Mad. 96.
2. (1935) 70 M.L.J. 532.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Pentakota Latchanna and another .. *Petitioners**

v.

Vugginna Kannayamma .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 244, 245 and 246—Trial begun as a summons case—Evidence disclosing offence triable as a warrant case—Adoption of warrant case procedure thereafter—Legality.

If a Magistrate begins a trial as a summons case and then after taking evidence finds that an offence triable only under warrant case procedure has been committed, he is entitled to apply warrant case procedure thenceforward and it cannot be said that under sections 244 and 245 of the Criminal Procedure Code, the Magistrate was bound at that stage to acquit the accused of the offence triable under summons case procedure and not entitled to register a case triable as a warrant case and proceed under Chapter XXI.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate of Narasapatam, dated 29th October, 1945, in C. A. No. 43 of 1945 (C. C. No. 549 of 1945, Stationary Sub-Magistrate, Narasapatam).

E. Venkatesam for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Respondent not represented.

The Court made the following

ORDER.—The petitioners were first indicted under sections 426 and 352 of the Indian Penal Code and the summons procedure was followed upto a certain stage. Subsequently the trying Magistrate felt that the evidence disclosed offences under sections 379 and 352 of the Code and decided to adopt the warrant case procedure. It is admitted that thereafter the provisions of Chapter XXI were duly followed and ultimately the petitioners were convicted under sections 379 and 352 of the Code. Objection was taken to this course and it was pointed out that under sections 244 and 245 of the Code of Criminal Procedure the Magistrate was bound, at the stage when he attempted to convert the summons case into a warrant case when he found that no case had been made out under sections 426, Indian Penal Code, to acquit the accused and he was not entitled to register a case under section 379 and proceed under Chapter XXI. With regard to this contention at one time it found acceptance in this Court. In *Rajaratnam Pillai*, In re[1], King, J., said this:

"'Triable under this chapter' means, of course, any offence triable under the procedure laid down for the trial of summons cases, and, although section 246 does not contain any explicit prohibition of the procedure now complained against, it is quite obvious that such prohibition is implied in it and that, once a Magistrate has taken cognizance of a summons case, he cannot convict an accused person for anything but an offence triable as a summons case."

This view was dissented from by Burn, J., in *Venkataramanier* v. *Varadarajulu Chetti*[2]. Referring to the decision cited above, the learned Judge observed,

"With all respect to King, J., I am unable to follow the reasoning in *Rajaratnam Pillai* v. *Emperor*[1]. . . If a Magistrate begins a trial as a summons case and then finds that an offence triable only under warrant case procedure has been committed, he is, I think, bound to apply warrant case procedure thenceforward and he is not in any way disqualified from proceeding with the trial."

The question came up later before King, J., in *Malai* v. *Emperor*[3], and he reconsidered the opinion expressed by him in *Rajaratnam Pillai*, In re[1], and stated that the position had been set out in that case with some lack of precision. He did not adhere to the view that once a Magistrate has taken cognizance of an offence which is triable only according to the procedure applicable to summons case he must stick to that procedure. The learned advocate for the petitioners tried to show that the facts

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*Cr.R.C. No. 85 of 1946. 15th August, 1946.
(Cr.R.P. No. 82 of 1946).

1. (1936) 70 M.L.J. 340 : I.L.R. 59 Mad. 442.
2. 1938 M.W.N. Crl. 109.
3. (1937) M.W.N. 981.

of the case before Burn, J., and the later case before King, J., were slightly different from the present case but I see no difference in principle. This contention must, therefore, be negatived.

On the merits, there is hardly anything to consider. The learned Joint Magistrate has found that the removal of the crop was not with a view to establish a right or supposed right and the trial Court has found that the removal was done with a dishonest intention. An offence under section 352 of the Indian Penal Code has also been made out.

I see no reason to interfere with the conviction of the petitioners. The sentences are not unreasonable. The petition is dismissed.

V.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Venkadari Thippayya and others .. *Accused.**

Criminal trial—Tahsildar giving evidence in the case, succeeding the Magistrate trying it and himself trying the same case—Legality—Consent of accused, if can validate such trial.

A Tahsildar who has given evidence in a case, when he succeeds the Magistrate who had been trying it, is not competent to try the same case himself. The impropriety of passing a judgment in a case in which the magistrate had himself given evidence is obvious. The consent of the accused to such a procedure cannot validate such a trial which is manifestly improper.

Case referred for orders of the High Court under section 438, Criminal Procedure Code, by the Sessions Judge of Kurnool in his letter dated 2nd April, 1946.

A. Bhujanga Rao for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—In C. C. No. 127 of 1945, in the Court of the Additional First Class Magistrate of Kurnool one Vandari Changalrayudu was charged with an offence in contravention of the Defence of India Rules. The case was taken up for trial and the Tahsildar of Nandyal, Mr. K. M. Ahmed Sahib Bahadur, gave evidence as P. W. 4. After he had given evidence but before the case was closed, Mr. Ahmed was appointed Additional First Class Magistrate of Kurnool to succeed the Magistrate who was trying C. C. No. 127 of 1945. He proceeded with the trial of the case and convicted the accused. The accused appealed to the Sessions Judge of Kurnool and the learned Sessions Judge set aside the conviction on the ground that Mr. Ahmed should not have heard the case after he had himself given evidence in it, and directed that it should be re-heard by any other competent Magistrate. Subsequent to the passing of this judgment, in appeal, the learned Sessions Judge learnt that Mr. Ahmed had taken up and continued the trial of C. C. No. 127 of 1945, with the consent of the accused. The learned Sessions Judge has now made this reference and asks that, in the circumstances, his order of remand should be set aside and the appeal be restored to the file of his Court for disposal on merits.

In my judgment the reference cannot be accepted. Mr. Ahmed should never have tried the case in view of the fact that he had himself given evidence in it. The impropriety of passing judgment in a case in which he had himself given evidence should have been obvious to him. The consent of the accused cannot validate a trial that was so manifestly improper. The reference is therefore rejected. The order passed on appeal by the learned Sessions Judge, in my opinion, was the proper order even if the fact of the consent of the accused had been known to him when he passed judgment and it will stand.

V.S. —— *Reference rejected.*

* Cr.R.C. No. 404 of 1946. (Case Referred No. 14 of 1946). 8th August, 1946.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Pipireddigari Gopala Reddi and another .. *Petitioners**

v.

N. Lakshmi Reddi .. *Respondent.*

Indian Penal Code (*XLV of* 1860), *sections* 339 *and* 341—*Voluntary obstruction of a vehicle in which a person is travelling—If amounts to wrongful restraint of that person—Whether person in vehicle being allowed to proceed on foot makes any difference.*

P. W. 1 was driving a cart along a path passing in front of the petitioners' house. The petitioners stopped the cart and unyoked the bulls. P. W. 1 fell down when the bulls were unyoked and the bulls ran away and he thereafter proceeded on his way on foot. On the question whether the acts of petitioners amounted to wrongful restraint of P. W. 1 within the meaning of section 339, Indian Penal Code,

Held, that the voluntary obstruction of a vehicle in which a person was travelling would amount to wrongful restraint of that person. The fact that a person might get down and then be left at liberty to proceed on his way unmolested, would be immaterial. If he was prevented from proceeding at the moment of restraint the terms of the section are satisfied.

In re *Peria Ponnuswami Goundan*, A.I.R. 1927 Mad. 506, followed ; *Maharani of Nabha* v. *Province of Madras*, (1942) 2 M.L.J. 14 : I.L.R. 1942 Mad. 696, explained and distinguished ; *Durga Pada Chatterjee* v. *Nilmani Ghose*, A.I.R. 1935 Cal. 252, dissented from.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Gooty, in C.A. No. 52 of 1945 (C.C. No. 596 of 1945, Stationary Sub-Magistrate's Court, Tadpatri).

V. C. Gopalaratnam for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The question in this criminal revision case is whether the petitioners were rightly convicted of offences under section 341 of the Penal Code. The facts as found are these. The petitioners apparently objected to P. W. 1 driving a cart along a path which passed in front of their house. On the day on which the offence is said to have been committed, P.W. 1 was seen by the accused to pass at about 11 A.M. and then when he returned at about 12-30 P.M. they stopped the cart and unyoked the bulls. P.W. 1 who was sitting on the shaft fell down when the bulls were unyoked. The bulls ran away and P.W. 1 proceeded on his way on foot. Accepting the evidence the learned Magistrate convicted the accused of offences under section 341, Indian Penal Code, and sentenced them each to pay a fine of Rs. 50.

The argument advanced by Mr. V. C. Gopalaratnam for the petitioners is that there was no wrongful restraint within the meaning of section 339, Indian Penal Code, because, although the cart was stopped, P.W. 1 was left free to proceed on his way on foot. The restraint, in short, it is argued, was of the vehicle and not of the person as required by section 339, Indian Penal Code. The argument no doubt receives support from decisions of the Bombay and Calcutta High Courts (vide *Emperor* v. *Ramalala*[1] and *Durga Pada Chatterjee* v. *Nilmani Ghose*[2]). These decisions, however, have not been followed in a series of decisions by single Judges of this Court (vide In re *Peria Ponnuswami Goundan*[3], *Md. Yusuf Sahib*, In re[4], and *Muthu Padayachi* v. *Emperor*[5]). In the case first cited Jackson, J., stated in his order:

"It is argued that restraining a horse on which a person is riding is not wrongful restraint as defined by section 339, Indian Penal Code. If the person is prevented from proceeding at the moment of restraint the terms of the section are satisfied. It is no defence that he might have got off the horse, and walked in the same direction."

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* Cr. R. C. No. 111 of 1946. 8th August, 1946.
(Cr. R. P. No. 108 of 1946).

1. (1912) 15 Bom.L.R. 103.
2. A.I.R. 1935 Cal. 252.
3. A.I.R. 1927 Mad. 506.
4. (1938) 2 M.L.J. 583.
5. (1934) M.W.N. 620.

It is contended that there are other Madras decisions which are opposed to the three decisions cited and that in particular these three decisions must be taken to have been overruled by a decision of a Bench of this Court in *Maharani of Nabha* v. *Province of Madras*[1]. I will deal with the Bench case in a moment. The other two decisions cited do not seem to me to be in conflict with the three decisions of single Judges to which reference has already been made. They are *Kumbola Guruvadu* v. *Kristna Reddi*[2] and Criminal Revision Case No. 125 of 1899 [Weir's Criminal Rulings, Volume I, page 340, (1905 edition) page 341]. It does not seem to me that in *Kumbola Guruvadu* v. *Kristna Reddi*[2], Oldfield, J., has adopted the view taken in the Calcutta High Court that to stop a cart with a man in it is restraint of the vehicle and not of the person. It appears from his judgment that it was not clear from the evidence where the cart was being driven or whether there were any people in it. Criminal Revision Case No. 125 of 1899 (Weir's Criminal Rulings, Vol. I, page 340, 1905 edition) was not a case of a cart being stopped by a person but the case of an obstruction put across a path which prevented carts in general from proceeding along that path although it did not prevent persons from stepping over it. In *Maharani of Nabha* v. *The Province of Madras*[1], no doubt an observation is to be found at page 716 of the judgment from which it appears that the learned Judges would have taken the view that the stoppage of a cart would not amount to the offence of wrongful restraint if the person in the cart was not restrained himself but was left at liberty to go on his way without the cart. The question, however, did not arise for decision in the case in this form as in so far as the question of wrongful restraint arose at all it was admitted that the offence had been committed. The observation was obiter and was made in the course of the discussion of the question whether the Maharani of Nabha had been wrongfully confined and not of the question whether she had been wrongfully restrained. I do not think therefore I am bound to differ from what is the general course of decisions of this Court by anything that has been said in *Maharani of Nabha* v. *Province of Madras*[1]. With respect to the learned Judge who decided *Durga Pada Chaterjee* v. *Nilmani Ghose*[3], referred to above, I am unable to see why the voluntary obstruction of a vehicle in which persons were travelling should not amount to the wrongful restraint of the persons in the vehicle. The fact that the person or persons may get down and then be left at liberty to proceed on their way unmolested seems to me immaterial. I agree with the observation of Jackson, J., that if the person is prevented from proceeding at the moment of restraint the terms of the section are satisfied. In that view the petitioners were rightly convicted, and I see no sufficient reason to interfere with the sentence passed.

The petition is therefore dismissed.

K.C. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR.

Sri Rajah Ravu Venkata Mahipathi Gangadhara Rama Rao Bahadur Garu, Yuvarajah of Pithapuram and another .. *Appellants**

v.

The Province of Madras, represented by the Collector of East Godavari, Coconada .. *Respondent.*

Suits Valuation Act (VII of 1887), section 11 (b)—Entertainment by appellate Court of objection as to jurisdiction—When justified—Objection to jurisdiction taken at the earliest opportunity—Finding of the trial Court patently against facts—Not enough to justify appellate Court entertaining the plea of want of jurisdiction unless the under-valuation has prejudicially affected the disposal of the suit on the merits.

As the words of sub-clause (*b*) of section 11 of the Suits Valuation Act stand, to justify the entertainment by the appellate Court of the plea of want of pecuniary jurisdiction, it is not enough if it is proved that the decision of the suit is wrong or that some of the points in dispute have not been correctly

1. (1942) 2 M.L.J. 14 : 5 F.L.J. 103 (H.C.): I.L.R. (1942) Mad. 696.
2. (1915) M.W.N. 203.
3. A.I.R. 1935 Cal. 252.

* A. A. O. No. 197 of 1945. 17th July, 1946.

determined. It must be further shown that the under-valuation has affected the disposal on the merits prejudicially. In other words, an intimate connection between the under-valuation and the wrong disposal on the merits must be established.

The mere facts that the objection to pecuniary jurisdiction was taken at the earliest opportunity and that the finding of the trial Court regarding the value is patently against the facts, do not give the appellate Court power to entertain the plea of jurisdiction and act upon it by directing that the plaint should be presented to the proper Court when it has not found, for reasons to be recorded in writing, that the under-valuation has prejudicially affected the disposal of the suit on the merits. The argument that if the suit was properly valued, the respondent would get the right to go before the High Court on first appeal and insist on a hearing on the facts, of which right the respondent was deprived of by the under-valuation, cannot be entertained as it would not be a case of prejudicial disposal of the suit on merits.

Kelu Achan v. *Cheria Parvathi Nethiar*, (1923) 45 M.L.J. 135 : I.L.R. 46 Mad. 631 (F.B.), followed.

Appeal against the order of the Court of the Subordinate Judge, Amalapuram, in A.S. No. 65 of 1944 preferred against the decree of the Court of the District Munsiff, Razole, in O.S. No. 108 of 1939.

Ch. Raghava Rao for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the plaintiffs from an order of the Subordinate Judge of Amalapuram holding that the suit which was tried by the District Munsiff of Razole was beyond his pecuniary jurisdiction and directing the plaint to be returned for presentation to the proper Court. The Province of Madras which was the defendant in the suit raised an objection to the valuation of the suit and contended that the plaintiffs under-valued the properties. The District Munsiff held on this issue that the suit was properly valued and was within the pecuniary jurisdiction of his Court. He decided the merits of the suit in favour of the plaintiffs and granted the declaration and injunction sought. On appeal the Subordinate Judge came to the conclusion on the question of jurisdiction that the suit was under-valued and without going into the merits of the other issues raised in the suit he directed the return of the plaint to the proper Court as stated already. He refrained from deciding the other issues deliberately and not inadvertently; he states in paragraph 13 of his judgment,

"As this Court is to try this suit, it is not desirable to express my decision on the merits."

The plaintiffs urge that as the Subordinate Judge has not found, as required by section 11 (*b*) of the Suits Valuation Act that the under-valuation has prejudicially affected the disposal of the suit on the merits, he had no right to entertain the plea of jurisdiction and act upon it by directing that the plaint should be presented to the proper Court. There can be no doubt that the sub-clause referred to does lay down the condition that the appellate Court must be satisfied, for reasons to be recorded by it in writing that the under-valuation has prejudicially affected the disposal of the suit on the merits. In the absence of such a finding, it is not open to the appellate Court to decline to hear the appeal merely because the suit was under-valued. This is what section 11 says in unmistakable terms. When this difficulty was pointed out to the learned Subordinate Judge, he got over it by stating that the objection to jurisdiction had been taken at the earliest stage and that the finding given by the lower Court about the value of the property was patently against the facts. But neither of these grounds is sufficient to support the order made by him. If the objection had not been taken at the earliest possible opportunity, it could never have been entertained at all. The fact that it was so taken does not mean that the other condition required by the section can be overlooked. The fact that the District Munsiff erred in thinking that the lands were waste lands while really they were cultivable lands and thus arrived at a wrong conclusion on their value means nothing more than that we have a decision before us in which the under-valuation of the properties of the plaintiffs was wrongly held to be correct. In other words, it is a decision which appertains to the issue as to jurisdiction. The section, however, requires something more, namely, that there must not only be a defect of jurisdiction by reason of an under-valuation

but also a disposal of the suit on the merits which has been prejudicially affected by such an under-valuation. The Subordinate Judge has not considered the question whether there has been any such disposal and he had no right on the materials placed before him to hold straightaway that as there was an under-valuation the plaintiffs must go to another Court.

What exactly is the meaning to be attached to the words of this sub-clause (*b*) which requires that the over-valuation or under-valuation of the suit must have prejudicially affected the disposal on the merits is rather difficult to say or determine. It should be noted that as the words stand it is not enough for the party concerned to prove that the decision of the suit is wrong or that some of the points in dispute have not been correctly determined. He must go further and show that the under-valuation has affected the disposal on the merits prejudicially; he must establish an intimate connection between the under-valuation and the wrong disposal on the merits. It is not easy on the spur of the moment to give a proper illustration of this condition. But it may be stated that one such case is possibly what is referred to by the Allahabad High Court in *Moolchand Motilal* v. *Ram Kishen*[1]. An under-valuation of the suit sometimes enables it to be tried as a suit of a small cause nature with all the concomitant brevity attached to such a trial as against a trial of the suit as an original suit with the obligation thrown on the Court to follow a more elaborate procedure of pleadings, the framing of issues, and the taking down of depositions in full and so on and so forth.

What is not to be regarded as a prejudicial disposal has been considered in several cases. One of them is found in a Full Bench decision of our High Court in *Kelu Achan* v. *Cheriya Parvathi Nethiar*[2], where the argument was that because of the under-valuation the party had been deprived of the privilege of a trial before a Subordinate Judge from whose decision an appeal would lie on the facts to the High Court. The learned Judges who delivered the opinion of the Full Bench point out that this is not the kind of prejudicial disposal contemplated by sub-clause (*b*). The learned Government Pleader drew my attention to the decision of Kumaraswami Sastri, J., in *Tirumal Rao* v. *Subramania*[3], but this is hardly of any help. In dealing with a civil revision petition, the learned Judge accepted the finding that there was an under-valuation and held that the District Munsiff had failed to determine certain questions and wrongly decided certain others and set aside the decree and directed the return of the plaint so that it might be presented to the proper Court. So far as I am able to see, it did not decide how the wrong decision of the Munsiff on the merits could be said to have had anything to do with the under-valuation of the suit. The necessity for the inter-relation of the two things which is required to be established by the statute was not borne in mind by the learned judge, if I may say so with great respect. Moreover, that case is of no help in the present case because as stated already the learned Subordinate Judge has not even held that the decision of the Munsiff on the merits was in any way wrong. He did not go into the questions at all as he thought that the matter should be dealt with by the Court to which the plaint must be presented.

The order is obviously wrong and must be set aside. There can be no prejudice to the Government, apart from any technicalities, in the Subordinate Judge dealing with the appeal because even in the event of the order being upheld, if it had been possible to do so, all that the Government would get is a hearing by the Subordinate Judge. They will get such a hearing now on appeal, though not as in the Court of first instance. The argument that by the adoption of this procedure they would be deprived of going before the High Court on first appeal and insisting on a hearing on the facts cannot be entertained in view of the Full Bench decision already referred to, reinforced as it is by the view taken by the Allahabad Full Bench case.

The appeal is allowed and the lower appellate Court is directed to take back Appeal No. 65 of 1944 on its file and dispose of it according to law. Any question

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1. (1933) I.L.R. 55 All. 315 (F.B.).
2. (1923) 45 M.L.J. 135 : I.L.R. 46 Mad. 631 (F.B.).
3. A.I.R. 1920 Mad. 843.

of court-fee which may be raised by the Government will of course have to be decided by the lower Court. The appellants will get their costs of this appeal from the respondent. The costs in the lower Court will abide the ultimate result.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

V. Madhava Rao Naidu .. *Appellant**

v.

Sri Gangadeswarar Temple by trustees Sabapathi Pillai and others .. *Respondents.*

Madras City Tenants Protection Act (III of 1922), sections 2 and 11—Purchaser of the right, title and interest of a tenant after tenancy was terminated by notice because of denial of landlord's title—If "tenant" under the Act entitled to a notice under section 11 before suit for ejectment.

The auction purchaser of the right, title and interest of a tenant after his tenancy was terminated by notice because of the tenant's denial of the landlord's title is not a "tenant" within the meaning of the Madras City Tenants Protection Act entitled to a notice in accordance with section 11 of the Act before a suit for ejectment. It cannot be said that because the tenant was in possession after the termination of the tenancy he was therefore entitled to pass on the benefit of the Act to the auction purchaser of his right, title and interest.

Appeal under Clause 15 of the Letters Patent, against the decree and judgment of the Hon'ble Mr. Justice Somayya, dated 17th September, 1945, and passed in C.C.C.A. No. 56 of 1944, preferred to the High Court against the decree of the City Civil Court, Madras, in O.S. No. 3679 of 1939.

G. T. Ramanujachari for Appellant.

M. Chelva Aiyangar for Respondents.

The Judgment of Somayya, J., was as follows :—

This appeal arises out of a suit filed by the appellant for recovery of possession of about 5-5/6 grounds comprised in Re-survey No. 3155 situated in Kuttiappa Gramani Street, Madavakkam. The appellant's case is that the suit plot belonged to the plaint temple, that one ground of it was originally leased out in 1904 to Ponnappa Naicken, that Ponnappa sold his leasehold interest to Ranganayaki Ammal, that Ranganayaki Ammal sold it to Munuswami Gramani, that in 1926 Munuswami Gramani sold it to Ponnuswami and that Ponnuswami's lease was subsequently determined. The defendant was at first a mortgagee from Ponnuswami. Subsequently he obtained a mortgage decree and in execution of that decree purchased whatever rights Ponnuswami had in the property. The appellant further states that after terminating Ponnuswami's tenancy the trustees took possession of the property and leased it out to third parties and that after the respondent purchased the property in execution of his mortage decree obtained against Ponnuswami, he threatened to interfere with the possession of the appellant's tenants. This suit is therefore for a declaration that the respondent is not entitled to the suit site. There is also a prayer for possession of the property.

The suit was at first decreed by the City Civil Judge but on appeal to this Court in C.C.C. A. No. 37 of 1942 the decree was set aside and the suit was remanded for disposal according to law. This time the City Civil Judge dismissed the suit for possession but granted a decree declaring the title of the appellant. The title of the appellant to the suit was found but the relief for possession was refused on the ground that the necessary three months' notice provided by section 11 of the City Tenants Protection Act (Madras Act III of 1922) was not given by the appellant and hence this appeal. There were also various other questions raised, some of which are discussed in the judgment of the lower Court.

The appellant's case is that the original lease was only of one ground and that the respondent is now in wrongful possession of 5-5/6 grounds. The main defence is that the property belonged absolutely to Ponnuswami and that the plaint allegation that Ponnuswami was a lessee of the land from the temple is not true. The alternative defence is that even if Ponnuswami was a lessee, the respondent was entitled to the benefit of the City Tenants Protection Act. There was a further plea that the title of the appellant was lost by adverse possession. From the documents it appears that in the sale deed by Ponnappa to Ranganayaki Ammal (Exhibit P-1 of 1918) the extent is mentioned as 3 grounds and 1,350 square feet. The same extent is mentioned in the sale deed by Ranganayakai Ammal to Munuswami Gramani (Ex. P-2). This is of the year 1921. In 1926 Munuswami sold the property in his turn to Ponnuswami. This is evidenced by Ex. D-1. In this document the boundaries are given and also the measurements on the four sides. The extent lying within these boundaries is not stated, but it is conceded that it works out at 5-5/6 grounds. The subsequent mortgage deed by Ponnuswami in favour of the defendant (Ex. P-5) also gives the boundaries and measurements on the four sides. On the same day as the mortgage there was a lease

*L.P.A. No. 71 of 1945. 15th April, 1946.

back by the defendant to Ponnuswami evidenced by Ex. D-5 and that document follows the description in Ex. P-5 and in Ex. D-1. The sale certificate issued to the defendant when he purchased the property in execution of his mortgage decree also gives the same. (Ex. D-6.) The City Civil Judge, who originally tried the suit, found that the tenancy was only of the extent covered by Exhibits P-1 and P-2, *i.e.*, 3 grounds and 1,350 square feet (*vide* paragraph 35 of his judgment). In the present judgment the City Civil Judge does not give a definite finding whether the defendant was a tenant of only 3 grounds and 1,350 square feet or of 5-5/6 grounds. The Judge says that the plaint did not seek to make any difference between the 3 grounds and odd covered by Exhibits P-1 and P-2 and the rest of it. He says:—

"At one stage of the trial I thought that Ponnuswami Gramani should be deemed to be a tenant of 3 grounds and odd mentioned in Exhibits P-1 and P-2, and that in whatever expectation he was occupying the remaining extent of land, the defendant should be deemed to be a trespasser so far as that extra extent is concerned. But I found that the plaintiffs had made no such distinction at all in the plaint. Indeed they ask in the plaint that the entire land mentioned in the plaint schedule covering 5 grounds and odd should be given possession of to them. It is impossible at this stage to differentiate between the portions let to the original tenants and the portions enjoyed by them and to treat the latter portion as standing on a separate footing for purposes of section 11 of the City Tenants Protection Act."

This appears to me to be wholly untenable. The plaint stated that only one ground was comprised in the original tenancy. The respondent denied that the land ever belonged to the appellant and in the alternative it was stated that the tenancy was of the entire 5-5/6 grounds. The Court must find what exactly is the subject of the tenancy. If the tenancy was only of 3 grounds and odd, the rest must have been an encroachment and it is the bounden duty of the Court to give effect to the finding arrived at on the evidence. I do not wish to say more than this now. There seems to be ample justification for the finding of the former City Civil Judge on the prior occasion and the view he was inclined to take, namely, that the lease was only of 3 grounds and 1,350 square feet. This question has to be decided.

In the judgment of the lower Court reference is made to the decisions of this Court in *Ranganatham Chettiar* v. *Mariappa Mudali*[1], which was confirmed on appeal in *Ranganatham Chettiar* v. *Mariappa Mudali*[2]. The learned Judge says that difficulty felt by him in this case was also felt in the case cited above. The decision in *Ranganatham Chettiar* v. *Mariappa Mudali*[1] does not seem to have any bearing on the question at issue. In this case if on the documents the lease comprised only 3 grounds and 1,350 square feet it is for the Court to find where that extent is. As Mr. Arunachala Ayyar, learned counsel for the respondent, points out, if the Court finds that in spite of the extent mentioned in Exhibits P-1 and P-2 the entire extent of 5-5/6 grounds were from the very beginning the subject of the tenancy, it would be another matter. But this question has to be found.

The next point raised is that the tenancy of Ponnuswami was determined. It is said that Ponnuswami denied the title of the appellant in a prior Small Cause Suit No. 11012 of 1935. It is also pointed out that even in the present suit the respondent denied the title of the appellant. It is undoubted that under section 111 (*g*) of the Transfer of Property Act the tenancy is forfeited by denial of landlord's title; but the question will be whether the plaintiff gave notice as required by section 111 (*g*), which clearly applies to this case. Reference was made by Mr. Arunachala Iyer to section 114-A of the Act but that does not apply to a case of forfeiture by denial of the landlord's title. Therefore the only question is whether any notice was given prior to the suit as required by section 111 (*g*). Here again there is a complication introduced by the case put forward that the appellant actually took possession from Ponnuswami and that he, the appellant, let out the property to tenants and that subsequently, when the respondent purchased the property in execution of his mortgage decree disturbance was caused to the appellant's tenants. If really possession was obtained by the appellant then there was no need to prove that notice in accordance with section 111 (*g*) was ever given. That would only be necessary if possession was not taken from Ponnuswami. That question again has to be found.

Yet another question is to be decided whether any action of Ponnuswami in denying the title of the landlord and the landlord's act of taking possession from Ponnuswami would affect the rights of the defendant who, it appears, had a mortgage from Ponnuswami prior to the act of Ponnuswami denying the title of the landlord. The learned Judge is not right in stating that Exhibit P-15 on which the appellant relied as a notice satisfying the requirements of section 111 (*g*), even if such notice were necessary, could not be relied upon by the appellant. The learned Judge says that the 24th August, 1938, when that letter was sent is not stated to be the date when the cause of action arose. For the present suit the cause of action is given as the date when the respondent took possession, *i.e.*, 10th August, 1939, in pursuance of his purchase in execution of the mortgage decree. The anterior history has been set out and the mere fact that the cause of action, *i.e.*, the incident which immediately led to the suit is given as 10th August, 1939, when the respondent took possession of the property does not mean that the appellant is not entitled to rely upon forfeiture if it really did occur by reason of Ponnuswami's denial of title. I must here mention that the respondent's advocate does not admit that the pleas raised by Ponnuswami contained a denial of title such as would work out a forfeiture. It is also stated for the respondent that there are several acts on the part of the appellant subsequent to the alleged forfeiture, if any, caused by Ponnuswami's act treating Ponnuswami as a tenant which would amount to a waiver. This question again has to be decided.

1. (1942) 1 M.L.J. 92.   2. (1943) 1 M.L.J. 102.

Revised findings on the above questions on the evidence already on record will be submitted before the 15th August, 1945. Seven days for objections.

In pursuance of the directions contained in the above order the City Civil Judge, Madras, submitted the following revised finding :—

* * * * * *

This appeal coming on for final hearing on Wednesday and Thursday, the 5th and 6th days of September, 1945, after the return of the finding of the lower Court upon the issues referred by this Court for trial, the Court delivered the following judgment : Findings have been returned on the various questions set out in my previous order. Sri Gangadeswarar temple represented by the trustees is the plaintiff and the suit is to eject the respondent Madhava Rao Naidu from a plot measuring 5-5/6 grounds comprised in Re-survey No. 3155 situated in Kuttiappa Gramani Street, Madavakkam, Madras. The main defence is that the defendant is a tenant entitled to protection under the Madras City Tenants Protection Act (Madras Act III of 1922) and that the suit is not maintainable as no notice under section 11 of the Act was given by the plaintiff-appellant. The suit was at first decreed by the City Civil Judge, but on appeal the suit was remanded for fresh disposal. The City Civil Judge then dismissed the suit for possession, but granted a decree declaring the title of the appellant. The relief for possession was negatived on the ground that the necessary three months' notice provided in section 11 of the Act was not given by the appellant. The appellant did not admit that the entire extent of the land in the possession of the respondent was the subject of the lease. The case was that except one ground of land, the rest was under unlawful occupation of the respondent as a trespasser. There was also a question raised that the tenancy, such as it was, was forfeited by the disclaimer of the landlord's title. Five questions were formulated by me and findings called for.

The first question is : What is the extent of the land demised ? On this point the lower Court has returned a finding that the extent is 3 grounds and 1,350 square feet. The respondent attacks this finding and urges that the lease in fact comprised the entire area. Certain facts are not disputed. The original lease was in favour of one Ponnappa Naicken in the year 1904 and there was no document. Ponnappa sold his leasehold interest to one Ranganayaki Ammal and she sold her interest to Munuswami Gramani. Munuswami Gramani in turn sold the leasehold interest to Ponnuswami. Ponnuswami created a mortgage over his interest in favour of the respondent and the respondent obtained a decree, brought the property to sale and purchased Ponnuswami's right. Ponnappa's sale to Ranganayaki Ammal is evidenced by Exhibit P-1 dated 24th August, 1918. Ranganayaki Ammal's sale to Munuswami is evidenced by Ex. P-2 dated 15th April, 1921. Both these documents mention the extent as 3 grounds 1,350 square feet. In 1926 Munuswami sold the property under Exhibit D-1. It is in this document that in addition to giving the boundaries as given in the previous documents Exs. P-1 and P-2, the measurements on the four sides were also given. The exact area is not mentioned, but if we calculate the area taking the measurements on the four sides, we get an extent of about 5-5/6 grounds. The same boundaries and the measurements on the four sides are repeated in the mortgage deed by Ponnuswami and in the later documents. The respondent's learned advocate urges that the boundaries in all the documents being the same, all the area included in the four boundaries passes and that where there is a difference between the extents and the boundaries the latter should prevail. No doubt this is the rule that is ordinarily applied when there is a difference between the area within stated boundaries and the actual area given in the documents. But this is not conclusive and if there are other circumstances to show that all the area within the boundaries was not the subject of the transaction, the above rule gives way. As the lower Court has pointed out, the respondent admitted in the witness-box that Ponnuswami, his predecessor-in-title, mortgaged to him more than what he, *i.e.*, Ponnuswami possessed. Therefore admittedly Ponnuswami did not own all the area situated within the four boundaries mentioned in Exhibit D-1. Nor was Ponnuswami the owner of the entire extent of 5 and 5/6 grounds. Further, the extent mentioned in Exhibits P-1 and P-2, is 3 grounds and 1,350 square feet. The mention of 1,350 square feet shows that in all probability the evidence adduced by the appellant is true, namely, that at the time of the original lease the land was actually measured and given. Otherwise it is difficult to understand the description as "3 grounds and 1,350 square feet." I see therefore no reason to differ from the finding of the lower Court that the extent leased was only 3 grounds 1,350 square feet. The result of this is that at least as regards the balance, *i.e.*, the difference between 5 and 5/6 grounds and 3 grounds 1,350 square feet the respondent is only a trespasser and the City Tenants Protection Act does not apply. The appellant is entitled to a decree for this extent in any event.

The next question is whether there has been a forfeiture of the tenancy. This is based upon Ponnuswami's repudiation of the landlord's title. This has been found by the lower Court. It is clear from a perusal of the written pleas filed by Ponnuswami in Small Cause Suit No. 11012 of 1935 on the file of the Presidency Small Cause Court, Madras, that he denied the tenancy and claimed title in himself. Exhibit P-9 is the written pleas and it contains an unequivocal statement that he was not a tenant and that he claimed to be the absolute owner. That was a suit for rent filed by the appellant against Ponnuswami. It is in that suit that Ponnuswami filed the above statement. There is therefore no doubt that Ponnuswami incurred forfeiture.

The next question is whether an overt act or a notice as required by section 111 (*g*) of the Transfer of Property Act was given and whether it binds the respondent. The respondent purchased the interest of Ponnuswami at a Court sale held in February, 1938. The tenancy being prior to the

amendment made under section 111 (g) is not retrospective in character. Before the Amending Act of 1929, the landholder had only to do some act showing his intention to determine the lease. As amended the law requires the lessor to give notice in writing to the lessee of his intention to determine the lease. In the present case two documents are relied upon by the appellant to satisfy the requirements of the law. They are Exhibits P-14-a and P-15. Exhibit P-14 is dated 16th September, 1936 and Exhibit P-15 is dated the 24th August, 1938. Exhibit P-15 says that Ponnuswami denied the tenancy and that therefore the lease was terminated. That document certainly satisfied the requirements of even the amended section. Exhibit P-14-a is said by the appellant's learned advocate to equally satisfy the requirements of the law. Before referring to it, it must be stated that the appellant's case as put forward in the plaint was that only about 1 ground of land had been leased to Ponnappa Naicker. Admittedly there was no document to evidence the lease. The land was a vacant land and a hut was later on put up only on a very small portion of the land. The portion occupied by the superstructure would not amount even to a fraction of a ground and the area on which the superstructure stands is no guide to determine whether the extent leased was 1 ground or 3 grounds and 1,350 square feet or 5 and 5/6 grounds. It appears that in 1936 some trees were cut down by Ponnappa and removed. Two notices were given on the 16th September, 1936. By Exhibit P-14 the appellant called upon Ponnuswami to pay Rs. 50 being the value of the trees cut and carried away by Ponnuswami. Exhibit P-14-a is of the same date and that being the important, I set it out in full:

"It is represented to me by my clients, the trustees of Sri Gangadeswarar Koil and connected temples, Purasawalkam, Madras, that without their knowledge or permission you are occupying about 2 grounds in extent of the land belonging to the Pathala Ponniamman temple in R. S. No. 3155, that you have put a superstructure thereon, that your such occupation is wrongful and that you are bound to vacate and put my clients in possession of the same.

This is to give you notice that unless within three days from your receipt hereof you vacate and deliver vacant possession of the said plot of land my clients will be constrained to institute necessary legal proceedings against you as they may be advised in the premises.

If however you are desirous of continuing in occupation of the said land you may apply to my clients for a lease of the same on such terms and for such period as may be agreed upon between you . . . ."

The repudiation of the tenancy by Ponnuswami was on the 26th September, 1935. The lower Court has found that there was a forfeiture and also the necessary notice. While referring to both Exhibits P-14-a and P-15, the lower Court has not stated whether Exhibit P-14-a satisfies the requirements of the law. That question becomes necessary for the determination of the plea raised under the City Tenants Protection Act. If before the respondent acquired Ponnuswami's interest in the Court sale of February 1938, Ponnuswami's right had already been determined legally, he would only be a trespasser or a tenant holding over and it will raise the question whether a transferee from a tenant will be himself a tenant entitled to protection under the Act. That is why the question whether Exhibit P-14-a is enough to bring about a termination of the tenancy becomes very material. It is argued for the appellant that the notice refers to a plot upon which the superstructure was raised and that the notice refers to the possession of Ponnuswami of the plot on which superstructure had been raised as wrongful and that Ponnuswami was called upon to vacate that plot. The appellant's learned advocate therefore argues that though the extent of the land is stated to be about 2 grounds, it only refers to the land leased in respect of which lease the tenant has repudiated the title. On the other side it is said that this notice refers really to the 2 grounds which is the difference between 3 grounds 1,350 square feet as mentioned in Exhibits P-1 and P-2, and the 5 and 5/6 grounds as mentioned in the later document. The respondent's learned advocate draws my attention to the statements in Exhibit P-14-a that Ponnuswami was in wrongful occupation of about 2 grounds of land, without the knowledge or permission of the appellants. It is said that this description cannot refer to the land which was admittedly the subject of the original tenancy. No doubt there seems to be some difficulty to accept the respondent's argument. Having regard to Ponnuswami's denial of title, the appellant was evidently advised to draft the notice in the way in which it was done. It is not necessary that the notice should declare in so many terms that the tenancy was determined owing to a repudiation of title. Even the amended Act requires no more than an intimation to the lessee of the lessor's intention to determine the lease. I find therefore that Exhibit P-14-a is a valid notice. It is unnecessary to go into the question whether the amending Act of 1929 is retrospective or not or to consider the decision cited by the appellant's learned advocate in *Krishna Prasad Singh* v. *Adyanath Ghatak*[1].

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1. (1943) I.L.R. 22 Pat. 513.

The next question is whether the forfeiture has been waived. This was raised before me on the former occasion and I called upon the lower Court to give a finding. The lower Court has returned a finding against the waiver set up. No reason is shown for my differing from the finding of the lower Court on this point. There are no materials on which a waiver can be found.

There remains the question whether the respondent is a tenant entitled to protection under section 11 of the City Tenants Protection Act. In order to get over the Act, the appellant advanced a case that the land had been actually taken possession of by the appellant and leased to a third party and that therefore the Act was not applicable. If really possession had been taken by the appellant and leased to a third party and the respondent afterwards caused obstruction, it is clear that he cannot rely upon section 11 of the Act. On this question the City Civil Judge has recorded a finding that possession was not taken as pleaded by the appellant. This finding is very strongly attacked by the learned advocate for the appellant. The appellant's case is that it took possession of the property and leased the same to one Srinivasa Mudali. The lease deed in favour of Srinivasa Mudali is dated 1st October, 1938, and it recites that possession was given to the lessee. The extent leased under the document was 7 grounds and it admittedly includes the suit land. The only question is whether the appellant had already taken possession of the suit lands and whether Srinivasa Mudali was put in possession of the suit land and the other land comprised in the lease to him. The lower Court's finding that no possession was given to Srinivasa Mudali is based upon Exhibit P-16, notice given to Ponnuswami on the 3rd November, 1938. By Exhibit P-16 the appellant gave intimation to Ponnuswami that the land was leased to Srinivasa Mudali and called upon him to put Srinivasa Mudali in possession. This clearly indicates that possession was not taken before the 3rd November, 1938.

Another fact relied upon by the lower Court is that when the respondent was obstructed in his attempt to take possession of the suit property after purchasing the same in Court auction he filed C. M. P. No. 3897 of 1938 for removal of obstruction against the alleged obstructors and got an order removing obstruction; Srinivasa Mudali is not one of the four objectors who were impleaded in that petition. It is said therefore that if really Srinivasa Mudali was in possession, obstruction would have been offered by him and that the respondent would have impleaded him in the above petition and got an order against Srinivasa Mudali. Srinivasa Mudali filed O. S. No. 3013 of 1939 for an injunction but that was tried along with this suit and dismissed with the remark that he will be entitled to actual possession after the present plaintiff in this suit got possession and that there were no grounds to grant an injunction prayed for by him. As against all this there is the evidence of P. W. 1, a trustee of the temple who says that he delivered possession to Srinivasa Mudali. On these materials it is difficult to come to any other conclusion than the one arrived at by the lower Court. It is not possible to say that Srinivasa Mudali was put in possession and that the respondent later on caused obstruction to Srinivasa Mudali. I must proceed on the footing that Srinivasa Mudali was not in possession and that the respondent got possession in pursuance of the Court's order on the petition already referred to.

This being the case the question is whether the respondent is a tenant as defined by the Act. If so the suit for possession is bound to fail for the reason that no notice was given to him under section 11. The expression "tenant" is defined in section 2, sub-section (4) thus:

"'Tenant' means tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy."

Thus there are three classes of persons who are tenants under the Act. The first class comprises what may be called the direct tenants, *i.e.*, tenants of land liable to pay rent. This obviously refers to cases where there is privity of contract. Admittedly there is no privity of contract between the appellant and the respondent. The next class refers to persons deriving title from him, *i.e.*, from the tenant. The appellant's argument is that the expression is 'person deriving title from him' *i.e.*, the tenant, and that if the person from whom the respondent derives title was not on the relevant date a tenant, the respondent would not come within this expression. The respondent derives title from Ponnuswami under the Court sale held in February 1938. By that time Ponnuswami had ceased to be a tenant. His tenancy had been forfeited and lawfully terminated. Therefore he does not satisfy the description of a tenant in February, 1938, and therefore the respondent is not a person deriving title from a tenant. This argument is sought to be supported by referring to the next class of tenants included in the definition and that is "and includes persons who continue in possession after the termination of the tenancy." It is urged that the Legislature has clearly made a difference between persons who are tenants and persons who continue in possession after the determination of the tenancy. It is pointed out that the expression "every other person deriving title from him" comes before the expression "persons who continue in possession after the determination of the tenancy" and that therefore a person deriving title from a person who continues in possession after the determination of the tenancy is not within the definition. The respondent's advocate argues that even persons who derive title from a tenant holding over is also within the definition. Having regard to the language of sub-section (4), I am of opinion that the appellant's contention is right. If the respondent's argument is to be accepted, the expression "every other person deriving title from him" should really come after the next class of persons, *i.e.*, persons who continue in possession after the termination of the tenancy. Taking the last class, it refers to persons who continue in possession after the termination of the tenancy. It obviously refers to a person who was a tenant before the termination of the tenancy and who continues to be in possession after the determination of the tenancy. The

word "continue" shows that it is the same person who was there on the land as a tenant before termination that is contemplated by the last class. A person who was a tenant and who continued to be in possession after the termination of the tenancy is under the general law not a tenant.

He is strictly a trespasser. But by express language the Act includes such persons who continue in possession after the termination of the tenancy under the category of persons who are protected under the Act. But for this last clause, a person who held over after the termination of the tenancy would not be entitled to the benefits of the Act which is intended to protect only tenants. If, therefore, a person who is not a tenant claims the benefits of the Act, there must be express language including him under the category of persons entitled to the benefits of the Act. I am therefore unable to accept the respondent's argument that a person who derives title from a person whose tenancy had already been determined is a tenant within section 2, sub-section (4). The expression "every other person deriving title from *him*" refers to what precedes it, *i.e.*, to the tenant.

The result is, the appeal must be allowed as regards the entire extent and a decree given as prayed for with costs throughout.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is the auction purchaser of the right, title and interest of one Ponnuswami in the property in suit, and claims the benefit of the Madras City Tenants Protection Act of 1921. Ponnuswami admittedly was a tenant of only a portion of the land in suit. The total area measures 5-5/6 grounds. Both the City Civil Court and Somayya, J., on appeal held that the tenancy only applied to 3 grounds 1,350 square feet, which meant that the appellant was certainly a trespasser so far as the rest of the area was concerned. Ponnuswami denied his landlord's title and therefore the landlord was entitled to terminate his tenancy, which was done by a notice given to him on 10th September, 1936. He was informed that unless he vacated and delivered vacant possession of the land within three days of the receipt of the notice, proceedings in ejectment would be taken against him. The appellant's purchase of the right, title and interest of Ponnuswami took place two years later. If Ponnuswami had in law any right in this land it would have passed to the appellant but clearly he had none.

The appellant says that he is a tenant within the meaning of the Madras City Tenants Protection Act of 1921 and that the suit was bad because no notice was given to him in accordance with the provisions of section 11. Somayya, J., has given reasons for holding that the appellant is not a tenant within the meaning of the Act and we agree with him. The Act defines a tenant as meaning a tenant of land liable to pay rent on it, every other person deriving title from him and includes persons who continue in possession after the termination of the tenancy. The argument of the appellant is that Ponnuswami was in possession after the termination of his tenancy and therefore was entitled to pass on the benefit of the Act to the appellant. It is impossible to accept the argument that a person who claims under a person whose tenancy has been determined is a tenant and is entitled to further notice. When the appellant purported to purchase Ponnuswami's rights, Ponnuswami was not a tenant and therefore could assign no tenancy right to the appellant.

The appeal is dismissed with costs.

K.S. ——— *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD MACMILLAN, M. R. JAYAKAR AND SIR JOHN BEAUMONT.

Lala Duni Chand and others .. *Appellants**

v.

Mosammat Anar Kali and others .. *Respondents.*

Hindu Law of Inheritance (Amendment) Act (II of 1929)—Applicability—Male dying intestate before the coming into force of the Act and being succeeded by a female heir who dies after that date—"Dying intestate" Construction and meaning.

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*9th July, 1946.

The Hindu Law of Inheritance (Amendment) Act not only applies to the case of Hindu male dying intestate on or after the 21st February, 1929 (the date of its operation), but it also applies to the case of such a male dying intestate before that date, if he was succeeded by a female heir who died after that date.

The words "dying intestate" in the Act cannot be relied upon as connoting the future tense. Those words are a mere description of the status of the deceased and have no reference and are not intended to have any reference to the time of the death of a Hindu male. The expression merely means "in the case of intestacy of a Hindu male." To place this interpretation on the Act is not to give a retrospective effect to its provisions, the material point of time being the date when the succession opens, namely, the death of the female heir.

Shrimati Shakuntala v. *Kausalya*, (1935) I.L.R. 17 Lah. 356, approved.

During the lifetime of the widow or female heir, the reversioners in Hindu Law have no vested interest in the estate but have a mere *spes successionis* or a chance of succession, which is a purely contingent right which may or may not accrue, and the succession would not open out until the widow or female heir died, and the person who would be the next reversioner at that time would succeed to the estate and the alteration in the rule of Hindu Law brought about by the Act would then be in full force.

Rajpali Kunwar v. *Sarju Rai*, (1936) I.L.R. 58 All. 1041 (F.B.), approved.

C. S. Rewcastle, K.C. and *Ralph Parikh* for *J. M. Parikh, K.C.*, for Appellants.

Sir Thomas Strangman, K.C., *W. Wallach* and *J. M. R. Jayakar* for Respondents.

Their Lordships' Judgment was delivered by

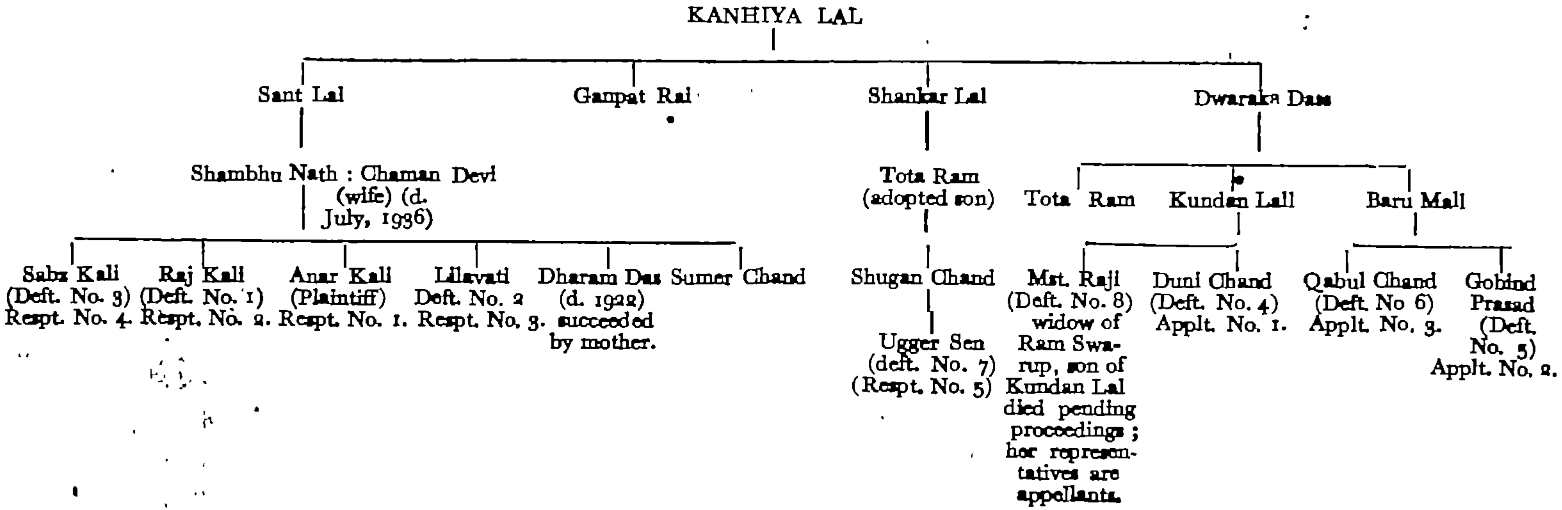
JAYAKAR.—This is an appeal from a judgment and decree of the High Court of Judicature at Allahabad, dated 29th August, 1941, which affirmed the judgment and decree of the Court of the First Civil Judge of Saharanpur, District Saharanpur, dated the 10th January, 1938.

The parties are Hindus subject to the Mitakshara Law of Benares School, and this appeal involves the construction of the Hindu Law of Inheritance (Amendment) Act, 1929 (Act No. 2 of 1929) which is hereinafter referred to as " the Act ". The Act is not expressed to come into operation on a particular day. It received the assent of the Governor-General on the 21st February, 1929, and under the provisions of section 5 of the General Clauses Act, 1897, (Act No. 10 of 1897) it came into operation immediately on the expiration of 20th February, 1929.

The description and preamble of the Act make it clear that the object of the Act is to alter the order of succession of certain persons therein mentioned, namely, a son's daughter, daughter's daughter, sister and sister's son, and to rank them as heirs in the specified order of succession next after a father's father and before the father's brother.

The Act thus amends the old order of succession in Hindu Law by introducing certain persons as heirs, who had no such place according to the ordinary interpretation of Mitakshara Law. The Act is one of the several measures enacted during recent times, in a reformative spirit, with a view to bringing the ancient rules of Hindu succession into conformity with what are regarded as the changing conditions and sentiments of present day Hindu society. It therefore selects certain relatives and gives them a preferential place in the order of succession, irrespective of their sex, over more remote relatives, on the ground that judged by the pure test of blood relationship to the deceased owner, they are nearer heirs than those superseded by the provisions of the Act.

The question for determination in this appeal is whether on a true construction of the Act, it applies only to the case of a Hindu male dying intestate on or after the 21st February, 1929 (the date of its operation), or whether it also applies to the case of such a male dying intestate before the date, if he was succeeded by a female heir who died after that date. The genealogical table relating to the parties in the case is as follows :


KANHIYA LAL
Sant Lal
Ganpat Rai
Shankar Lal
Dwaraka Das
Shambhu Nath : Chaman Devi (wife) (d. July, 1936)
Tota Ram (adopted son)
Tota Ram
Kundan Lall
Baru Mall
Sabz Kali (Deft. No. 3) Respt. No. 4.
Raj Kali (Deft. No. 1) Respt. No. 2.
Anar Kali (Plaintiff) Respt. No. 1.
Lilavati Deft. No. 2 Respt. No. 3.
Dharam Das (d. 1922) succeeded by mother.
Sumer Chand
Shugan Chand
Ugger Sen (deft. No. 7) (Respt. No. 5)
Mst. Raji (Deft. No. 8) widow of Ram Swarup, son of Kundan Lal died pending proceedings; her representatives are appellants.
Duni Chand (Deft. No. 4) Applt. No. 1.
Qabul Chand (Deft. No 6) Applt. No. 3.
Gobind Prasad (Deft. No. 5) Applt. No. 2.

The facts giving rise to this litigation are as follows :

There was a partition by means of an arbitration award between Shambhu Nath, Ganpat Rai, Shankar Lal and Dwarka Dass. At that time Kanhaiya Lal and Sant Lal appear to have been dead. Under the award, Shambu Nath received as his share a certain set of property and a half share in another set of property. On Shambu Nath's death, his only surviving son, Dharam Das, succeeded to his properties, Sumer Chand having predeceased Shambu Nath. Dharam Das died in 1922, before the date of the Act, leaving neither a widow nor descendants. His mother, Mst. Chaman Devi, succeeded him as his heir, taking a Hindu widow's estate. He also left four sisters, Msts. Sabz Kali, Raj Kali, Anarkali, and Lilavati. Chaman Devi died in July 1936 (after the date of the Act), when the succession to the estate of Dharam Das opened.

Anar Kali, respondent No. 1, one of Dharam Das's sisters instituted the present suit in the Court of the Civil Judge of Shaharanpur, against her sisters (respondents 2, 3 and 4) and the present appellants and Uggar Sen (Respondent No. 5), her brother's collaterals, together with Mst. Raji, the widow of one of such collaterals. In her plaint she alleged that Dharam Das was the last full owner of the plaint properties and that on his death his mother, Chaman Devi, took a widow's estate and that on her death in July, 1936, her daughters (respondents 1 to 4), as sisters of Dharam Das, became heirs to his estate under the provisions of the Act and entered into proprietary possession of the properties in the plaint. She claimed that she had a one-fourth share in the first set of properties and a one-eighth share in the other set of properties on the ground that, in those properties, she and her sisters were the owners only of one-half, defendants Nos. 4-8 being owners of the other half. She also claimed partition of her share in both the sets of properties.

The plaintiff's sisters (defendants 1, 2 and 3) filed separate written statements admitting the claims of the plaintiff and praying that their respective shares might also be partitioned on payment of Court-fees.

The contesting defendants Nos. 4-8 filed a joint written statement denying that the plaintiff or her sisters were the heirs and stating that they themselves were the owners of the property. They claimed that they had succeeded to the property as the heirs for Dharam Das, who had died before the Act came into force, and the Act having no retrospective effect did not apply to the parties to the suit.

Six issues were framed of which the following alone is now material :

Whether the plaintiff and defendants 1-3 or defendants 4-6 are the heirs of Dharam Das.

Before the trial Judge it was admitted that succession to the properties in question opened on the death of Chaman Devi. On the 10th January, 1938, the learned trial Judge delivered judgment, holding that Dharam Das was the last owner of the properties in suit and that the Full Bench decision, *Rajpali Kunwar* v. *Sarju Rai and others*[1], applied to the case, consequently the Act applied and the sisters of Dharam Das were the owners of the property in preference to the contesting defendants. He decreed the plaintiff's claim for partition, and ordered that the three sisters of the plaintiff, defendants 1-3 should also get their respective shares on the payment of the necessary court-fee. The suit was thus decreed with costs.

A decree dated the 10th January, 1938, was accordingly drawn up. From the said decree, defendants 4, 5 and 6 (the present appellants) appealed to the High Court at Allahabad. Pending the disposal of the appeal, Mst. Raji died, and on the 15th October, 1939, the present appellants were brought on the record as her legal heirs. The only point raised in that appeal related to the application of the Act to the present case. On the 29th August, 1941, the High Court delivered judgment, holding that the suit was covered by the Full Bench decision, *Rajpali Kunwar* v. *Sarju Rai and others*[1], and that there were full bench decisions of

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1. (1936) I.L.R. 58 All. 1041 (F.B.).

several of the other High Courts to the same effect. The appeal was accordingly dismissed with costs. A decree followed on the 29th August, 1941. From this decree the appellants have appealed to His Majesty in Council.

On the question at issue in this case relating to the application of the Act to the present case, there is, as the High Court judgment observes, a series of Full Bench decisions of Indian High Courts covering this exact point. These have been reviewed in the judgment of the learned Chief Justice of the Allahabad High Court in the case of *Rajpali Kunwar* v. *Sarju Rai*[1]. It is therefore unnecessary for their Lordships to go over the same ground again. It will be sufficient to observe that their Lordships are in complete agreement with the views of the learned Chief Justice in that case, that, during the lifetime of the widow, the reversioners in Hindu Law have no vested interest in the estate but have a mere *spes successionis* or a chance of succession, which is a purely contingent right which may or may not accrue, that the succession would not open out until the widow died, and that the person who would be the next reversioner at that time would succeed to the estate and the alteration in the rule of the Hindu Law brought about by the Act would then be in full force.

In the argument before their Lordships, reliance was placed upon the words "dying intestate" in the Act as connoting the future tense, but their Lordships agree with the view of the Lahore High Court in the case *Shrimati Shakuntala* v. *Kaushalya*[2], that the words are a mere description of the status of the deceased and have no reference and are not intended to have any reference to the time of the death of a Hindu male. The expression merely means "in the case of intestacy of a Hindu male." To place this interpretation on the Act is not to give a retrospective effect to its provisions, the material point of time being the date when the succession opens, namely, the death of the widow.

On the position of reversioners in Hindu Law, opinions have been expressed by this Board from time to time, with which the views of the learned Chief Justice in the case of *Rajpali Kunwar* v. *Sarju Rai and others*[1], mentioned above, are in agreement. It was said for instance, that until the termination of the widow's estate, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband, *Katama Nachiar* v. *Raja of Sivaganga*[3]. The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon its termination, the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death (*Moniram Kolita* v. *Kerry Kolitany*[4]).

There is no vesting as at the date of the husband's death and it follows that the questions of who is the nearest reversionary heir, or what is the class of reversionary heirs, fall to be settled at the date of the expiry of the ownership for life or lives, *Janaki Ammal* v. *Narayanaswami Aiyar*[5]. The death of a Hindu female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility, or *spes successionis*, but this possibility is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death. The Indian Law, however, permits the institution of suits in the lifetime of the female owner to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike, *V. Venkatanarayana Pillai* v. *Subbammal*[6]. The reversioners' rights during the lifetime of the female heir are merely of a protective character and nothing more, and whenever action is taken by the presumptive reversioner, it is in a representative capacity and on behalf of all the reversioners,

1. (1936) I.L.R. 58 All. 1041 at pp. 1046, 1048 (F.B.).
2. (1935) I.L.R. 17 Lah. 356 at 357.
3. (1863) 9 M.I.A. 539, 604.
4. (1879) L.R. 7 I.A. 115, 154: I.L.R. 5 Cal. 776 (P.C.).
5. (1916) 31 M.L.J. 225: L.R. 43 I.A. 207: I.L.R. 39 Mad. 634 (P.C.).
6. (1915) 28 M.L.J. 535: L.R. 42 I.A. 125: I.L.R. 38 Mad. 406 (P.C.).

and not on the footing that the person taking the action is in fact the next reversioner at the date of the suit. The decisions of Indian High Courts, on which the High Court has relied in this case, proceed on these principles and cover the precise point raised in this appeal.

For these reasons their Lordships are of opinion that the judgment appealed from is right and ought to be affirmed and this appeal ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

H.J.U./V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

[Consolidated Appeals from the High Court of Judicature at Allahabad].

PRESENT :—LORD MACMILLAN, LORD WRIGHT, LORD DU PARCQ, LORD JUSTICE MORTON AND SIR JOHN BEAUMONT.

Babu Kailash Chandra Jain .. *Appellant**

v.

The Secretary of State .. *Respondent.*

Land Acquisition Act (*XXIII of* 1894), *section* 23 (3) (a) (*as amended by the U. P. Town Improvement Act,* (*VIII of* 1919)—*Scope and true effect of.*

The view of the Full Bench in *Makhan Das'* case, (1928) I.L.R. 50 All. 470, that neither a plot of land used by its owner as a garden at the relevant date, nor a plot of agricultural land lying fallow at the relevant date, is being put to any "use" within the meaning of section 23 of the Land Acquisition Act (as amended by the U. P. Town Improvement Act) because the owner is deriving no profit therefrom and that consequently, the owner is not entitled to any compensation on its compulsory acquisition, cannot be accepted. On the true construction of section 23 the former plot ought to be valued as a garden and the latter plot ought to be valued as agricultural land. The effect of section 23 (3) (a) of the Act of 1894 as so amended is that the possibility of the garden or agricultural plot being used (*e.g.*) for building purposes in the future must be disregarded.

C. S. Rewcastle, K. C. and *R. K. Handoo* for the Appellant.

J. Millard Tucker, K. C. and *W. Wallach* for the Respondent.

Their Lordships' Judgement was delivered by

LORD JUSTICE MORTON.—These consolidated appeals are from three decrees of the High Court of Judicature at Allahabad dated the 27th November, 1941, affirming three decrees of the Court of the Improvement Trust Tribunal, Allahabad, dated the 27th April, 1934, whereby, in respect of the compulsory acquisition of certain lands and buildings belonging to the appellant, he was awarded as compensation certain sums of money. The appellant contends that the sums awarded to him by the Tribunal were insufficient, in that they did not include any compensation for the acquisition of the following four pieces of land :—

(1) The garden of House No. 8, Mohalla Chak, Allahabad.

(2) 504 square yards of *Parti* land with enclosure wall known as No. 32, Mohalla Chah-Chand, Allahabad.

(3) Land with a long shed on one side of it known as No. 13, Mohalla Mahajani Tola, Allahabad.

(4) *Parti* land No. 22, Mohalla Mahajani Tola, Allahabad.

The appellant further contends that the Tribunal relying upon the Full Bench decision of the Allahabad High Court in *Secretary of State* v. *Makhan Das*[1], took an erroneous view as to the construction of section 23 (3) (a) of the Land Acquisition Act, 1894 (Act No. I of 1894) as amended by the United Provinces Town Improvement Act, 1919 (U. P. Act No. VIII of 1919).

The respondent on the other hand, contends that if the facts are carefully examined it will be found that the appellant was awarded compensation in respect of each of these four pieces of land, and that in assessing such compensation the Tribunal did not apply any wrong principle.

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*P.C. Appeal No. 65 of 1944. 1st May, 1946.

1. (1928) I.L.R. 50 All. 470 (F.B.).

It is, therefore, necessary for their Lordships to examine in some detail the facts in regard to each of these four pieces of land.

. . . .

[After discussing the facts their Lordships proceeded] :

The result is that there is no foundation for the appellant's contention that he was awarded no compensation in respect of these four pieces of land.

Turning to the appellant's second contention, their Lordships are unable to find that any wrong principle was applied by the Tribunal in assessing the market-value of these pieces of land.

The material sub-sections of section 23 of the Act of 1894, as amended by the Act of 1919, are as follows :—

"(1) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration :—

First the market-value of the land at the date of the first publication of the notification under section 36 of the United Provinces Town Improvement Act, 1919.

* * * * * * * *

(2) In addition to the market-value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market-value, in consideration of the compulsory nature of the acquisition :

Provided that this sub-section shall not apply to any land acquired under the United Provinces Town Improvement Act, 1919, except :—

* * * * * * * *

(*b*) buildings in the actual occupation of the owner or occupied free of rent by a relative of the owner, and land appurtenant thereto, and

(*c*) gardens not let to tenants but used by the owners as a place of resort.

(3) For the purposes of clause first of sub-section (1) of this section :—

(*a*) the market-value of the land shall be the market-value according to the use to which the land was put at the date with reference to which the market-value is to be determined under that clause.

(*b*) If it be shown that before such date the owner of the land had in good faith taken active steps and incurred expenditure to secure a more profitable use of the same, further compensation based on his actual loss may be paid to him."

Their Lordships are unable to find that either the Officer or the Tribunal failed to assess the market-value according to the use to which these four pieces of land were put at the relevant date. The value placed upon them by the Officer appears to have been the market-value so assessed, and the Officer made his awards before the case of *Secretary of State* v. *Makhan Das*[1], had been decided. The Tribunal appears to have adopted the same method of valuation, though it would appear that the Assessors would have liked to adopt a more generous scale of compensation. Reference was made, however, by the President and Assessors of the Tribunal, and also by the High Court, to the decision of the Full Bench of the Allahabad High Court in *Secretary of State* v. *Makhan Das*[1], and the Judges of the High Court expressed their agreement with the decision of the Full Bench in that case.

Their Lordships accordingly think it desirable to say that certain observations in the judgment of Lindsay, J. (with which Sulaiman, J. and Mukerji, J., agreed) in *Makhan Das'* case[1] cannot be supported. Lindsay, J., appears to have taken the view that under section 23 of the Act of 1894, as amended by the Act of 1919, the market-value of land must be treated as being *nil* if the owner was not deriving any profit from the land at the relevant date. He continued :

"It need hardly be pointed out that such an enactment is fraught with much possible hardship to owners of property which has become subject to the operations of the Act. Lands of great value may, from variety of causes, fall temporarily out of use. Agricultural land may have to be left fallow for a season or two in order that it may recover productivity. Or the owner of a valuable site acquired for a building scheme may have to suspend the execution of his project in order, for example, to contest in Court a claim to a right of way over the land. In either case the owner is liable to be expropriated without compensation if a notification issues under the Act while the land is not being put to actual use.

1. (1928) I.L.R. 50 All. 470 (F.B.).

It is difficult to imagine that cases of this kind were in contemplation when the Act was passed, but the language of the Act, as it stands, must, if followed, lead to these results. It must be left, therefore, to the Legislature to declare whether it was intended to invest the Improvement authorities with this power of confiscation, or to amend the Act so as to avoid the results above-mentioned."

It would appear that, in the view of the Full Bench in *Makhan Das'* case[1] neither a plot of land used by its owner as a garden at the relevant date, nor a plot of agricultural land lying fallow at the relevant date, is being put to any "use" within the meaning of section 23, because the owner is deriving no profit therefrom; consequently, in the view of the Full Bench, the owner is not entitled to any compensation on its compulsory acquisition. Their Lordships are unable to assent to this view. On the true construction of section 23 the former plot ought to be valued as a garden and the latter plot ought to be valued as agricultural land. The effect of section 23 (3) (*a*) of the Act of 1894 as so amended is that the possibility of the garden or agricultural plot being used (*e.g.*) for building purposes in the future must be disregarded. It is significant that sub-clause (*b*) of that sub-section makes provision for the case of the owner having taken active steps and incurred expenditure to secure a more profitable use of the land. In such a case the owner may be paid "further compensation based on his actual loss". Apart from such a case, only the present use of the land can be considered for the purpose of arriving at the market-value.

There may be cases in which the Officer, or the Tribunal, could properly assess the market-value of the land acquired at *nil*, but their Lordships do not find it necessary to discuss that matter; each of the four pieces of land in question in this appeal clearly has a market-value. A value was placed on each of these pieces of land by the Officer and by the Tribunal and that value appears to have been assessed in accordance with the statutory provisions.

Accordingly, their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed. The appellant must pay the costs of the respondent.

Solicitors for the Appellant: *T. L. Wilson & Co.*

Solicitors for the Respondent: *The Solicitor, India Office.*

H.J.U./V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT:—LORD SIMONDS, M. R. JAYAKAR AND SIR JOHN BEAUMONT.

Natha Singh and another .. *Appellants**

v.

The King-Emperor .. *Respondent.*

Evidence Act (I of 1872), section 8—Motive—Proof of—Evidence suggesting commission of some crime other than that forming the subject of the charge—Admissibility.

The prosecution is entitled to call evidence in support of an alleged motive, however improbable it may be, and none the less so because such evidence may suggest that the accused have committed some crime other than that with which they are charged. If such evidence is given with a view to showing that they are persons likely to have committed the offence with which they are charged the evidence would be inadmissible; but it would be admissible to establish the motive for the offence with which they are charged.

A. G. P. Pullan and *J. M. R. Jayakar* for Appellants.

J. Megaw for Respondent.

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1. (1928) I.L.R. 50 All. 470 (F.B.).

18th June, 1946.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from two judgments and orders of the High Court of Judicature at Lahore, dated 7th June, 1945, which dismissed the appeals of the appellants, and confirmed the sentences of death passed on them, by the judgment, and order, dated the 9th February, 1945, of the Sessions Judge, Amritsar. Their Lordships have already announced that they will humbly advise His Majesty that the appeal be dismissed and they now give their reasons.

The ground upon which special leave to appeal was granted was the allegation that evidence that the appellants had committed a murder other than that with which they were charged was wrongly admitted, and this has been the principal point argued on their behalf.

The appellants were tried and convicted on a charge of having murdered one Karnail Singh on the 19th September, 1944. There were four alleged eye-witnesses of the murder, namely, the approver Qadir, who said that he had been with the appellants, Surain Singh, an uncle, Mt. Gurmej Kaur, the wife, and Jita, a servant, of the murdered man. Karnail Singh had a brother, Bhan Singh, whose wife was said to have been in illicit intimacy with the appellant Natha Singh, and Karnail Singh is said to have objected to this intimacy. There seems no reason to doubt the existence of this intimacy, nor that it had occasioned ill-will between Karnail Singh and his brother on the one hand and Natha Singh on the other. The other appellant, Budha Singh, was a friend of Natha Singh.

On the 1st October, 1944, after the appellants had been arrested for the murder of Karnail Singh, a body without a head was found, and this was said to be the body of Bhan Singh. On the information of the approver, Qadir, the appellants were also charged with the murder of Bhan Singh. This charge was tried with different assessors immediately after the conclusion of the trial of the appellants for the murder of Karnail Singh, but before judgment in the latter trial had been delivered. Judgment in both cases was delivered on the same day. The appellants were acquitted of the murder of Bhan Singh, mainly on the ground that there was no corroboration of the evidence of the approver, and that there was no clear evidence of the identity of the body. They were convicted of the murder of Karnail Singh.

At the trial of the appellants for the murder of Karnail Singh the approver gave evidence that he and the appellants had murdered Bhan Singh a few days before the murder of Karnail Singh, and that they proposed to conceal the murder of Bhan Singh by causing injuries to Karnail Singh and getting themselves arrested for so doing. That is to say, the evidence of the approver was that the motive, or at any rate one of the motives, for the injuries caused to Karnail Singh was a desire to conceal the murder of Bhan Singh. The suggested motive is no doubt a singular one, but however improbable an alleged motive may be the prosecution is entitled to call evidence in support of it, and none the less so because such evidence may suggest that the accused has committed some crime other than that with which he is charged (see illustration (*a*) to section 8 of the Evidence Act). If evidence that the appellants had murdered Bhan Singh had been given with a view to showing that they were persons likely to have committed the murder of Karnail Singh, the evidence would have been inadmissible; but it was admissible to establish motive for the murder with which they were charged. It would have been better if the learned Sessions Judge had pointed out to the assessors the limited purpose for which evidence of the murder of Bhan Singh could be used, but in trials with the aid of assessors the decision rests with the Judge, and not with the assessors, and when the Sessions Judge convicted the appellants of the murder of Karnail Singh, he knew that they had been, or were about to be, acquitted of the murder of Bhan Singh, and that the evidence as to the latter murder was of no consequence. In their Lordships' opinion the evidence objected to was properly admitted.

The only other point seriously argued on behalf of the appellants was that he evidence of the eye-witnesses should have been disbelieved since it was in con-

flict with the medical evidence. The story of the uncle, wife, and servant of Karnail Singh was that they saw the assault, rushed to the place as the assailants fled, and found Karnail already dead. The Civil Surgeon of Amritsar gave evidence in the Court of the committing Magistrate, and his evidence was brought on the record of the Sessions Court under section 509 (1) of the Code of Criminal Procedure. After detailing the injuries which he found on the dead body of Karnail he stated that the death occurred a few hours after receipt of injuries. This opinion no doubt conflicts with the story of the eye-witnesses, but it was open to the High Court, as well as to the Sessions Judge, to believe the witnesses in spite of the opinion of the doctor and they clearly did so. Moreover their Lordships observe that no reliance seems to have been placed in the Courts in India on a conflict between the evidence of the eye-witnesses and of the doctor. The matter is not discussed in the judgments either in the Sessions Court or the High Court, nor was it included in the grounds of appeal to the High Court. Had any emphasis been placed on the opinion of the Civil Surgeon, it would have been open to the Sessions Judge under the powers contained in section 509 (2) or to the High Court under the powers contained in section 429 to have summoned him as a witness, when the reasons for his opinion could have been investigated. It is too late to take the point now.

H.J.U./V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD SIMONDS, M. R. JAYAKAR AND SIR JOHN BEAUMONT.

Kumar Singh Chhajor and others .. *Appellants*

v.

The King-Emperor .. *Respondent.*

Special Criminal Courts Repeal Ordinance (XIX of 1943), section 3 (1) and (2)—"Sentence passed"—Meaning of—Scope and effect of section 3 (1) and (2)—Limit to the powers of interference by the High Court with orders of the Special Magistrates.

The word 'sentence' used in relation to the decision of a Criminal Court may bear either the wider meaning of the judgment or decision of the Court, or the narrower meaning of the pronouncement of the punishment imposed by the Court; but the primary meaning of "sentence imposed," the expression used in the Ordinance of 1943, is "punishment imposed." In view of the circumstances in which the Ordinance came to be promulgated, it cannot be said that the expression is used in other than its ordinary or primary meaning.

There is nothing in the language of section 3 (1) of the Ordinance of 1943 to suggest that the Governor-General intended to do more than to render valid the punishment imposed by the Special Courts leaving the validity of the convictions to rest on judicial decision. Sub-section (2) of section 3 mitigates the rigour of sub-section (1) and seems to be a necessary corollary to it. Sentences rendered valid by sub-section (1) by treating them as having been lawfully imposed under the Code are to be subject to the same rights in appeal and revision as they would have been subject to if actually so imposed. The subject-matter of sub-section (2) is the same as that of sub-section (1) and as the latter is confined to punishments imposed, sub-section (2) is also similarly limited. It follows that the High Court would have power in revision only to review the sentences passed by the Special Criminal Courts, to enhance them or to reduce them, but it would have no power to set the conviction aside or to direct a retrial. Nor does the High Court possess any inherent jurisdiction to interfere with an order of the Special Magistrate.

Kantilal Mangaldas v. *King-Emperor*, (1944) I.L.R. Bom. 142, Approved. *Vishindas Lachmandas* v. *King-Emperor*, (1944) A.I.R. Sind 1, Disapproved.

J. M. Pringle, K. C. and B. W. Ramsay for Appellant.

B. J. McKenna for Respondent.

Their Lordships' Judgment was delievered by

SIR JOHN BEAUMONT.—This is an appeal by special leave from an order of the High Court of Judicature at Fort William in Bengal, made on the 24th August, 1943. By its order the High Court directed that the convictions and sentences passed on the appellants by Mr. S. Chaudhury, acting as a special Magistrate under

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22nd July, 1946.

the Special Criminal Courts Ordinance, 1942, be set aside, and that the appellants be retried in the district of Hooghly.

The facts leading up to the appeal can be stated shortly. In January, 1943, the accused were tried on a charge of dacoity under section 395 of the Indian Penal Code, by Mr. Choudhury acting as such special Magistrate as aforesaid. On 19th January, 1943, they were acquitted on the charge under section 395, but were convicted under section 403 of the offence of misappropriation and entenced to pay a fine of Rs. 50 each. Subsequently, the High Court at Calcutta, of its own motion, called for the record of the case, and on the 24th August, 1943, a bench consisting of the Chief Justice, Mr. Justice Khundkar and Mr. Justice Lodge, set aside the convictions and sentences passed upon the appellants and ordered that they be retried in the district of Hooghly. The ground upon which this order was made was that in the view of the High Court there had been improper interference by the executive authority with the course of justice.

The only question upon which their Lordships have heard an argument is as to whether the High Court had jurisdiction to make the order which it did make, and the grounds upon which the order was based do not call for discussion. Their Lordships would, however, observe that if they were satisfied that the order of the High Court was within its competence they would be very slow to interfere with the manner in which the High Court saw fit to exercise its jurisdiction.

Under the Code of Criminal Procedure, a High Court possesses very wide powers of revision over the proceedings of inferior criminal Courts and in a case tried under the Code, there can be no doubt that a High Court acting under the powers conferred by sections 435 and 439, can send for the record of any proceedings and can set aside a conviction and order a new trial by a Court of competent jurisdiction subordinate to such High Court. If this case had been tried under the Code it would have presented no difficulty, but it was, in fact, dealt with under two Ordinances promulgated by the Governor-General under section 72 of Schedule IX of the Government of India Act, 1935, and the provisions of those Ordinances must be considered.

Under the Special Criminal Courts Ordinance, 1942, (which is hereinafter referred to as " the Ordinance of 1942 ") it is provided in section 3 that Courts of criminal jurisdiction may be constituted under the Ordinance consisting of :—

(1) Special Judges ;

(2) Special Magistrates, and

(3) Summary Courts.

Section 4 provides that a Provincial Government may appoint to be a Special Judge for such area as it may think fit any person who has acted for a period of not less than two years in the exercise of the powers of a Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure. Section 5 deals with the jurisdiction of Special Judges ; section 6 deals with their procedure, and section 7 with the sentences which they may impose. Section 8 enables proceedings before a Special Judge in specified cases to be submitted for review by a person nominated in that behalf by the Provincial Government, which person is to be chosen from the Judges of the appropriate High Court. Section 9 provides that any Presidency Magistrate or Magistrate of the first class, who has exercised powers as such for a period of not less than two years, may be invested by the Provincial Government with the powers of a Special Magistrate under the Ordinance. Section 10 deals with the jurisdiction of Special Magistrates. Section 11 deals with their procedure, and section 12 with the sentences which they may pass. Section 13 provides that where a Special Magistrate passes a sentence of transportation, or imprisonment for a term exceeding two years, an appeal shall lie to the Special Judge having jurisdiction in the area or, if there is no Special Judge, to the High Court in a Presidency town, and elsewhere to the Court of Session. Subsequent sections deal with summary Courts and are irrelevant to the present appeal. Section 26 is in the following terms ;

"Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall, save as provided in this Ordinance, be no appeal from any order or sentence of a Court constituted under this Ordinance, and, save as aforesaid, no Court shall have authority to revise such order or sentence, or to transfer any case from any such Court, or to make any order under section 491 of the Code or have any jurisdiction of any kind in respect of any proceedings of any such Court."

On the 22nd April, 1943, in the case of *The King-Emperor* v. *Benoari Lal Sarma*[1], the High Court of Calcutta held that the provisions of the Ordinance of 1942 were *ultra vires* and that the Special Courts purporting to act under that Ordinance had no jurisdiction. On the 4th June, 1943, this decision was upheld by the Federal Court of India in *Emperor* v. *Benoari Lal Sarma*[2]. To complete the history of the case it may be mentioned that on the 6th November, 1944, upon appeal to this Board, the decision of the Federal Court was reversed and it was held that the provisions of the Ordinance of 1942 were *intra vires* and that the Special Courts acting under that Ordinance had jurisdiction in *Emperor* v. *Benoari Lal Sarma*[3]. This decision, however, was given after the order of the High Court which is the subject of the present appeal.

On the 5th June, 1943, that is, the day, after the delivery of judgment by the Federal Court in *Benoari Lal's* case[2], the Governor-General promulgated Ordinance No. XIX of 1943 (which is hereinafter referred to as "the Ordinance of 1943").

Section 1 provides that the Ordinance shall come into force at once. Section 2 repeals the Ordinance of 1942. Section 3 is in the following terms :

"*Confirmation and continuance, subject to appeal, of sentences* :—

(1) Any sentence passed by a Special Judge, a Special Magistrate or a Summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance shall have effect, and subject to the succeeding provisions of this section, shall continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898 (V of 1898), by a Sessions Judge, an Assistant Sessions Judge, or a Magistrate of the first class respectively, exercising competent jurisdiction under the said Code.

(2) Notwithstanding anything contained in any other law, any such sentence as is referred to in sub-section (1) shall, whether or not the proceedings in which the sentence was passed were submitted for review under section 8, and whether or not the sentence was the subject of an appeal under section 13 or section 19, of the said Ordinance, be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the said Code if the sentence had at a trial so held been passed on the date of commencement of this Ordinance.

(3) Where any such sentence as aforesaid has been altered in the course of review or on appeal under the said Ordinance, the sentence as so altered shall for the purposes of this section be deemed to have been passed by the Court which passed the original sentence."

Section 4 deals with pending cases and is not material to the present appeal, and section 5 confers a right of indemnity.

The question as to the jurisdiction of the High Court to make the order under appeal was dealt with very shortly by the High Court in a single sentence contained in the judgment of the learned Chief Justice. He said : "We have our ordinary powers of revision and under the inherent jurisdiction of the Court confirmed to us in section 561-A of the Criminal Procedure Code we have powers 'to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.' If there were any doubt as to our jurisdiction to use those powers, here it is set at rest by sections 3 (2) and 4 of the Ordinance No. XIX of 1943."

In their Lordships' opinion, the suggestion that the High Court possessed inherent jurisdiction to interfere with the order of the Special Magistrate is quite untenable. At the date when the order of the High Court was made the Special Magistrate had been held to have had no jurisdiction. He was not a Court inferior to the High Court and indeed was not a Court at all, his order was a mere nullity, and no question of revising it could arise. This was pointed out in the opening

1. A.I.R. 1943 Cal. 285.
2. (1943) 6 F.L.J. 79 : (1943) 2 M.L.J. 207.
3. (1945) 1 M.L.J. 76 : L.R. 72 I.A. 57 : 1945 F.L.J. 1 (P.C.).

passages of the judgment of this Board delivered by Lord Simon in *The King-Emperor* v. *Benoari Lal Sarma and others*[1]. The restoration of the jurisdiction of Special Magistrates by the decision of this Board is irrelevant, since by that time the Ordinance of 1942 had been repealed by the Ordinance of 1943 and, apart from this, clause 26 of the former Ordinance took away all powers of revision by the High Court and no Court can claim inherent jurisdiction to exercise powers expressly taken away by legislation. In their Lordships' view, if the High Court possessed any power of revision in the present case, such power must be found in the Ordinance of 1943.

Section 3 of that Ordinance uses the expression "sentence passed" by a Special Judge or Special Magistrate and does not mention "conviction." It has been argued by the Crown that the word "sentence" is used in the Ordinance of 1943 in the wider sense as meaning the judgment or decision of the Court; on the other hand, the appellants contend that the word is used in the narrower sense of the pronouncement of the punishment imposed by the Court. They rely on certain sections of the Code of Criminal Procedure, *e.g.*, sections 401, 412 and 413, where the word is plainly used in the narrower sense. On the other hand, the Crown relies on sections 405 and 415 where the word is used in a wider sense. Their Lordships do not doubt that the word "sentence" used in relation to the decision of a Criminal Court may bear the wider or narrower meaning according to the context, but the primary meaning of "sentence passed," the expression used in the Ordinance of 1943, is "punishment imposed." The passing of sentence in a criminal trial is a distinct step which follows conviction; it is often postponed to a later date and may be based on further evidence relevant to sentence but irrelevant to guilt. In determining whether the expression is used in the Ordinance of 1943 in other than its primary sense it is necessary to notice the circumstances in which that Ordinance came to be promulgated. At that time, that is to say, in June 1943, the Governor-General was faced with the situation that many persons had been convicted by officials duly qualified as judges and magistrates experienced in the administration of the Criminal Law, but who had been held by the Federal Court to be without jurisdiction in these particular cases. It may be assumed that the Governor-General would desire to treat the decision of the Federal Court with all respect and that, wide as his powers may be in cases of emergency of legislation by Ordinance under section 72 of Schedule IX of the Government of India Act, 1935, he would be unwilling to promulgate an Ordinance brusquely setting at naught the decision of the Federal Court. On the other hand, as the authority responsible for the safety of India in a very dangerous period, he may well have felt that it would endanger public safety to release all persons who had been convicted and sentenced under the Ordinance. It was in that situation that the Ordinance of 1943 was promulgated, and it is in relation to that situation that it must be construed. Section 2 repealed the Ordinance of 1942 and thereby accepted the result of the decision of the Federal Court whatever might be the fate of a possible appeal against such decision. Section 3 (1) so far as material for the present purpose provides in effect that any sentence passed by a Special Magistrate under the Ordinance of 1942, shall have effect, and continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure by a Magistrate of the first class exercising competent jurisdiction under the said Code. It is very noticeable that it is the sentence passed which is to be treated as having been lawfully passed under the Code, and nothing is said about the conviction recorded. Conviction of a criminal offence may have serious consequences, apart from the punishment directly imposed for such offence. It may, for example, disqualify a person from holding office, or may affect his status in society. It would require clear language to establish that any legislative authority intended to provide that convictions held to have been illegal by the highest judicial tribunal in the country should, nevertheless, be treated as legal by legislative enactment. Their Lordships can find nothing in the language of section 3 (1) of the Ordinance of 1943 to suggest that the Governor-

1. (1945) 1 M.L.J. 76: L.R. 72 I.A. 57: 1945 F.L.J. 1 (P.C.).

General intended to do more than to render valid the punishment, imposed by the special Courts, leaving the validity of the convictions to rest on judicial decision. Sub-section (2) of section 3 mitigates the rigour of sub-section (1) by providing that any sentence referred to in sub-section (1) shall be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the Code if the sentence at the trial so held had been passed on the date of the commencement of the Ordinance. Sub-section (2) seems to be a necessary corollary to sub-section (1). Sentences rendered valid by sub-section (1) by treating them as having been lawfully imposed under the Code are to be subject to the same rights in appeal and revision as they would have been subject to if actually so imposed. But it is clear both from the opening reference to "any such sentence as is referred to in sub-section (1)" and from its plain intent that the subject-matter of sub-section (2) is the same as that of sub-section (1) and if sub-section (1) is confined to punishments imposed, sub-section (2) is similarly limited. This view of the meaning of the Ordinance of 1943 is in agreement with that taken by a Full Bench of the Bombay High Court in *Kantilal Mangaldas* v. *King-Emperor*[1] and in disagreement with the view of a Full Bench of the Chief Court of Sind in *Vishindas Lachmandas* v. *King-Emperor*[2]. In their Lordships' opinion the High Court of Calcutta had power in revision to review the sentences passed upon the appellants, to enhance them or to reduce them, but it had no power to set the convictions aside or to direct a retrial.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed and that the order of the High Court made on the 24th August, 1943, be set aside.

H.J.U./V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Gutti Nukamma .. *Appellant**

v.

Matcha Bansayya and others .. *Respondents.*

Limitation Act (*IX of* 1908), *Article* 182—*Decree in suit filed* in forma pauperis—*Direction to pay the amount of Court-fee to Government—Execution applications by Government and attachment of the decree—Subsequent application for execution of decree by the decree-holder—Execution applications by Government enure for the benefit of the decree-holder and start a new period of limitation.*

In a suit filed *in forma pauperis*, the plaintiff obtained a final decree on 23rd March, 1939, and he was directed to pay the amount of the Court-fee to Government. The Government filed on the 9th November, 1939, an application in execution and the final order for attachment of the decree was made on 21st March, 1940, and as the Government did not proceed with the execution, the proceedings were "closed" on that date. Again on 22nd March, 1943, the Government filed another execution application but as it failed to proceed with it, it was also "closed" on 18th November, 1943. Meanwhile, the plaintiff decree-holder applied for execution of the decree on 20th September, 1943. On a contention that it was barred by limitation,

Held, that as for the purpose of executing the order in its favour the Government is a party to the decree and can take steps to execute it, the applications for execution filed by the Government are applications for the execution of the decree itself and therefore enure for the benefit of the plaintiff decree-holder. Further by virtue of the provisions of order 21, rule 53, Civil Procedure Code, those applications have to be treated as applications for execution by the plaintiff acting through her representative in law. That being so each application started a new period of limitation and therefore the plaintiff's application for execution filed on 20th September, 1943, was in time.

Appeal against the order of the Court of the Subordinate Judge, Coconada, dated 4th October, 1945, in E. P. No. 405 of 1943 in O. S. No. 82 of 1933.

P. Somasundaram for Appellant.

P. Chandra Reddi for Respondent.

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1. (1944) I.L.R. Bom. 142. 2. 1944 A.I.R. Sind 1.

*A.A.O. No. 736 of 1945. 16th August, 1946.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal from an order of the Principal Subordinate Judge of Coconada dismissing an application for execution on the ground that it was barred by the law of limitation. On the 30th March, 1935, a preliminary decree was passed in favour of the appellant for the sum of Rs. 29,281-5-8; but the amount was subsequently scaled down under the provisions of the Madras Agriculturists' Relief Act to Rs. 4,368-1-0. On the 23rd March, 1939, the plaintiff obtained a final decree against the judgment-debtors, based on the scaling down. The suit had been filed *in forma pauperis* and under Order XXXIII, rule 10, of the Code of Civil Procedure, the plaintiff was directed to pay the amount of the Court-fee, Rs. 1,222-7-0, to the Government. Rule 13 says that all matters arising between Government and a party to the suit under rule 10, rule 11 or rule 12 of Order XXXIII shall be deemed to be questions arising between the parties to the suit within the meaning of section 47. This means that for the purpose of executing the order in its favour the Government is a party to the decree and can take steps to execute it.

On the 9th November, 1939, the Government filed an application in execution. This was numbered as E. P. No. 471 of 1939. The plaintiff and the judgment-debtors were made parties to the application. An order for the attachment of the decree was made and this was confirmed on the 21st March, 1940. The Government did not, however, proceed to execute the decree and on the 21st March, 1940, the Subordinate Judge "closed" the proceedings. On the 22nd March, 1943, the Government filed another execution petition—E. P. No. 152 of 1943. Again the decree was attached and the attachment was made absolute after notice to all the parties to the suit. It has been suggested by the learned advocate for the judgment-debtors that the judgment-debtors were not made parties to this application. It is true that they were not named at the beginning of the petition, but there is no doubt that they were made parties. Relief against them was asked for and they were all served with notice of the attachment. Again the Government failed to proceed further with the matter and consequently on the 18th November, 1943, the Subordinate Judge "closed" this petition.

On the 20th September, 1943, the plaintiff applied for execution of the decree obtained by her. The application was opposed by the judgment-debtors on the ground that the application was time barred. The plaintiff maintained that it was in time and advanced two reasons. The first was that the execution petitions filed by the Government on the 9th November, 1939, and the 22nd March, 1943, were "steps in aid of execution" within the meaning of Article 182 (5) of the Limitation Act. The second reason was that as the applications filed by the Government were in law applications for the execution of the decree itself, each started a fresh period of limitation. The Subordinate Judge refused to accept these contentions and dismissed the plaintiff's application as being time barred. The plaintiff has appealed.

It is not necessary for this Court to decide the question whether the applications filed by the Government for the purpose of realising the money due to it by way of stamp duty are steps in aid of execution within the meaning of Article 182, because we accept the appellant's contention that the applications for execution filed by the Government are applications for the execution of the decree itself and therefore enure for the benefit of the plaintiff. Order XXI, rule 53, makes provision for execution when the property attached is a decree. Sub-rule (2) states that where a Court makes an order for the attachment of a decree, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the decree and apply the net proceeds in satisfaction of the decree sought to be executed. Sub-rule (3) says that the holder of a decree sought to be executed by the attachment of another decree shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute the attached decree "in any manner lawful for the holder thereof." Therefore when the Government filed its applications for execution on the 9th November, 1939, and the 22nd March,

1943, it was acting and had the right to act, on behalf of the decree-holder. In other words, the applications have to be treated as applications for execution by the plaintiff acting through her representative in law.

The applications filed by the Government specifically asked for the sale of the property covered by the decree. The fact that the Government would have been entitled to priority in payment out of the sale proceeds does not make the applications any the less applications for the execution of the decree by the decree-holder's representative. This being the position each application started a new period of limitation and therefore the petition filed by the plaintiff herself for execution on the 20th September, 1943, was in time.

The appeal is allowed and the case remanded to the Subordinate Judge's Court, to hear and decide the application for execution in accordance with law. The appellant is entitled to her costs here and in the Court below.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Rahima Bibi .. *Appellant**

v.

A. K. Sherfuddin .. *Respondent.*

Contract Act (IX of 1872), section 68—Applicability of principle underlying the section to marriage expenses of Hindu and Mahomedan minors—Advances made for the marriage expenses of a minor Mahomedan girl—Right to reimbursement —Marriage, how far a "necessary".

Although the principle enunciated in section 68 of the Contract Act would not apply to the expenses of marriage of a minor under English law, the principle has been extended in India to cover the marriage expenses of Hindu minors. In the case of a minor Muslim girl marriage is a "necessary" that would come within the purview of section 68 of the Contract Act. Hence a person spending the necessary money for the marriage expenses of a minor Mahomedan girl, not intending to do so gratuitously, is entitled to relief under section 68 of the Contract Act.

Appeal against the decree of the District Court, Trichinopoly, in A. S. No. 97 of 1942, preferred against the decree of the Court of the Subordinate Judge, Trichinopoly, in O. S. No. 61 of 1940.

T. V. Ramanatha Aiyar and *S. Rajaraman* for Appellant.

K. S. Sankara Aiyar and *V. Sundaresan* for Respondent.

The Court delivered the following

JUDGMENT.—The appellant (the second defendant) was at all relevant times a minor Muhammadan girl. The first defendant is her brother and the third defendant her father. Both her father and brother were desirous of getting the girl married; and an opportunity arose of marrying her to a rich man, her guardian-*ad-litem* in this suit. The parents, however, were unable to raise sufficient funds to conduct the marriage and so approached the plaintiff, the girl's maternal uncle, and told him of their need. Although he did not enter into a contract with the first and third defendants, yet he expressed his willingness to spend such money as was necessary for the marriage. He did not intend to do so gratuitously and as the money was not repaid, he brought this suit impleading the girl, her father

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*S.A. No. 1639 of 1945. 1st August, 1946.

and her brother. The trial Court granted him relief under section 68 of the Contract Act. The lower appellate Court upheld the finding of the trial Court.

Although the principle enunciated in section 68 of the Contract Act would not apply to the expenses of marriage of a minor under English law, the principle has been extended in India to cover the marriage expenses of Hindu minors. The learned advocate for the appellant referred to two cases in which the reasons for applying the principle of section 68 to the expenses of marriage of a Hindu minor girl are said to have been accurately given. In *Nandan Prasad* v. *Ajudhia Prasad*[1] reference was made to the dire spiritual penalties incurred by a father who did not marry his daughter before she attained the age of puberty and therefore to the urgent necessity of getting a girl married before she attained that age. In *Tikilal* v. *Kamalchand and others*[2], Puranik, J., had to consider whether it was necessary to marry a Hindu male minor. He held that the case of a male minor could not be compared with that of a female minor for the reason given above; and so held that section 68 could not be applied to the expenses incurred in marrying a male Hindu minor. It is argued on behalf of the appellant that if a person who supplies funds to a male Hindu minor cannot invoke the provisions of section 68, *a fortiori* a Muslim who advances monies for the marriage of a Muslim minor girl could not. It is argued that a marriage amongst Muslims is of the nature of a contract rather than of a spiritual ceremony, and that therefore all the circumstances which would make it a religious necessity to provide for the marriage of a Hindu minor girl are absent in the case of a Muslim minor girl.

In the first place, it may be pointed out that although Puranik, J., in the Nagpur case cited above held that advances for the marriage of a Hindu male minor would not be necessary, that is not the view generally held by the High Courts in India. A Bench of the Patna High Court in *Pathak Kali Charan Ram* v. *Ram Deni Ram*[3], dealt with a claim under section 68 of the Contract Act connected with the marriage of a Hindu male minor, and it was held that it was necessary. So did this Court in *Annamalai* v. *Muthuswami*[4]. If these decisions are correct, the argument based on the religious necessity of marrying a Hindu girl before she attains puberty has no application. When we compare the case of a Hindu male minor with that of a Muslim minor girl, there is very little that can be said in support of a view that it is a necessity for the one that could not be said in favour of a contention that it is necessary for the other. It is argued that there is no objection under the Muhammadan law to a woman's contracting a marriage herself, and that therefore no person is justified in having recourse to a minor's estate for getting a Muslim girl married while a minor. It is suggested that the girl should be allowed to become a major and then to enter into a contract of marriage herself. Such a suggestion seems to me utterly impracticable in Muslim society as we know it; and I do not believe that Muslim law countenances such detachment by the girl's relations, which might well lead to the girl's ruin. It is true that in modern society, educated and advanced Muslims may not, in some cases, marry their daughters while they are still minors and may allow them to exercise some choice after they attain majority; but such cases are the exception and not the rule. In rural society, and even in ordinary urban society, there can be no doubt that such conduct on the part of the parents as is suggested as proper by the learned Counsel of the appellant would be severely condemned.

The learned author of the "Translation of the Holy Quran" (Muhammad Ali) quotes the text of the Quran "Marry those among you who are single." In a foot-note the learned author says:

> "The Holy Quran looks upon the married state as the normal state, and hence it enjoins that so far as possible those who are single should be married."

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1. (1910) I.L.R. 32 All. 325 (F.B.).
2. I.L.R. 1940 Nag. 632.
3. (1917) 2 Pat.L.J. 627.
4. (1939) 1 M.L.J. 792 : I.L.R. 1939 Mad. 891.

A similar sentiment is expressed by Abdur Rahman, J., in *Muhaidin Tharaganar* v. *Sainambu Ammal*[1], where the learned Judge said that according to the Muhammadan practice and tradition, a girl was expected to be married as soon after she attained puberty as possible. He refers to the change that has gradually crept over Muslim society on account of western influence, but regards that practice as still the normal one. A Kazi examined as P. W. 3 referred to a passage in the Hadiz in which it is stated " Muslims perform early marriage of a girl." He seems to have referred the question arising in this very case to the Head Kazi of the community in Madras, and a fatwa was sent in reply roughly to the effect that whether a girl had attained puberty or not, her father could get her married and meet the connected expenses, such as invitations, cloths and jewels, either from his own estate or from hers. P. W. 3 deposed—and I have no doubt that he was speaking the truth—that there were no unmarried girls in his society. I therefore have no doubt that the Courts below were right in holding that marriage was a necessary for a Muslim minor girl that would come within the purview of section 68 of the Contract Act.

It is argued that there was no sufficient proof of the expenses incurred by the plaintiff. He produced accounts and was able to speak to all the principal items of expenditure, because he himself was responsible for the conduct of the marriage and all the expenses were incurred according to his personal directions. The fact that the total amount spent was a very moderate one is in itself an indication that the various items of expenditure claimed by him were true.

An objection has been taken in this Court to the necessity for such a large expenditure as Rs. 3,000 ; but we do not find anything in the written statements which suggests that even if it be true that the plaintiff had spent this money, such a large expenditure was not necessary. As on account of the plaintiff's advancing this money the girl has been able to make a very good marriage with a well-to-do young man, it cannot be said that an expenditure of Rs. 3,000 is at all excessive.

The appeal is dismissed with costs.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

K. Swaminatha Iyer and another .. *Appellants**

v.

K. G. Krishnaswami Iyer and others .. *Respondents.*

Hindu Law—Debts—Promissory note executed by father—Decree against father—Execution—Sons' shares if can be sold.

Execution—Sale without attachment—Validity—Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 90.

Where a suit is brought by the payee against the maker of a promissory note and the decree is sought to be enforced against the judgment debtor's sons to the extent of their interest in the family property, the distinction between the liability on the instrument and the liability for the consideration thereof can have no meaning. It is not by reason of the father having represented the son in the suit that the son's interest is bound and passes at the execution sale but by reason of his pious obligation to pay his father's personal debt and the correlative power of the latter to sell family property including the son's share for the discharge of such debts, a power which the Court in execution exercises

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1. (1941) 1 M.L.J. 503 : I.L.R. 1941 Mad. 760 at 763.

*Appeals Nos. 240 of 1944 and 358 of 1945. 23rd August, 1946.

for the benefit of the judgment creditor. It is not the form of the decree or the frame of the suit but the nature of the debt that determines the son's liability. If it is neither illegal nor immoral, then all that the son can claim for the protection of his interest is an opportunity to show that the debt for which the decree was passed was not binding on him. [Case-law discussed].

Though attachment is a necessary preliminary to a judicial sale, a sale without attachment is not a nullity. Omission to attach is a material irregularity which renders the sale liable to be set aside under Order 21, rule 90 of the Code of Civil Procedure if substantial injury is proved. [Case-law discussed].

Appeals respectively against the decrees of the Court of the Subordinate Judge of Madura in O. S. Nos. 89 of 1942 and 33 of 1944.

B. Sitarama Rao and *T. S. Vaidyanatha Aiyar* for Appellants.

V. Ramaswami Aiyar and *A. Achuthan Nambiar* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—These connected appeals, though arising out of two suits tried separately by different Subordinate Judges, are aimed at securing the same relief to the appellants-plaintiffs, *viz.*, a declaration that a Court-sale held in execution of a decree obtained against their father is not binding on their shares in the property sold. The plaintiffs and their father are admittedly members of a joint Hindu family. The father and his brother since deceased borrowed Rs. 2,500 from the Madras People's Bank, Ltd., (in liquidation), executing a promissory note dated 19th January, 1938. The bank sued for recovery of the amount due and obtained a decree against the executants. The plaintiffs were not made parties to the suit. In execution of the decree the house now in question which admittedly belongs to the joint family was attached on 21st June, 1939, and on the following day the Court struck off the execution proceedings ordering however, that the attachment was to subsist for four months. Within that period the bank filed a fresh execution petition on 16th October, 1939, and, after sundry procedure consequent on the bank going into liquidation and the Official Liquidator being brought on record, the attached property was brought to sale on 23rd March, 1942, and was purchased by one Sundararaja Pillai. The sale was confirmed on 26th June, 1942, and delivery of possession was ordered on 29th March, 1943. Thereupon the plaintiffs instituted the two suits out of which these appeals arise, O. S. No. 89 of 1942, in the Subordinate Judge's Court, Madura, for partition and delivery of their shares in the family properties including the house now in question the sale of which they impeached as not binding on their shares, and O. S. No. 33 of 1944 in the same Court for setting aside the order for delivery referred to above and maintaining their possession of the house. The Court below upheld the sale in its entirety, and refused the relief sought by the plaintiffs in respect of the house. Hence the appeals.

The plaintiffs attacked the validity of the Court-sale on various grounds in the Court below, but Mr. Sitarama Rao appearing for the appellants pressed only two of them before us; firstly, the suit brought by the bank against the father having been based only on the promissory note and not also on the debt, and the plaintiffs not having been impleaded, the decree therein must be taken to have been passed personally against the father in his individual capacity and not as representing the other members of the family and that in execution of such a decree the father's share alone in the property brought to sale can be deemed to have passed to the purchaser; and, secondly, inasmuch as the attachment was ordered to continue in force only for four months but the property was sold long after the expiry of the period, the sale was void as a subsisting attachment was an essential pre-requisite for a valid execution sale where the decree itself did not order a sale.

On the first point, our attention was called to the plaint in the bank's suit to show that it was based solely on the promissory note of the father and not also

upon the consideration, and it was urged that a decree obtained against the father alone in a suit framed in that form was not binding on the sons' shares in the family properties even under the pious obligation rule. It was not suggested that the decree represented an avyavaharika debt or that the father did not receive consideration for the note; but it was said that, having regard to the frame of the suit, the decree was not a debt to which the pious obligation of the sons under the Hindu Law could be extended. No authority was cited in support of this somewhat novel contention. It is true that no one could be made liable on a negotiable instrument unless his name clearly appears as the name of the person liable thereon (*Sadasuk Jankidas* v. *Sir Kishen Prasad*[1]) and it is also true that a distinction has to be made for some purposes between liability on the instrument and liability for the consideration thereof as, for instance, in the case of an indorsee who is limited only to his remedy on the note (Vide *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[2]) or for the purpose of applying the presumption under section 118 of the Negotiable Instruments Act (Vide *Narayanarao* v. *Venkatappayya*[3]). The distinction also becomes relevant where the representative capacity of the executant as the manager of the family comes into question. It has been held that where a suit is instituted on a promissory note, it is *prima facie* a personal claim and the defendant alone is liable to satisfy the decree unless it directs that it is to be paid out of family property, although the debt was in fact incurred for family necessity (*Nagireddi* v. *Somappa*[4]). But the distinction can have no meaning where the suit is brought by the payee against the maker and the decree is sought to be enforced against the judgment debtor's son to the extent of his interest in the family property. For, it is not by reason of the father having represented the son in the suit that the son's interest is bound and passes at the execution sale but by reason of his pious obligation to pay his father's personal debt and the correlative power of the latter to sell family property including the son's share for the discharge of such debts, a power which the Court in execution exercises for the benefit of the judgment-creditor. This was recognised in the last mentioned case where the Court emphasised that it was not concerned with the application of the pious obligation rule in execution proceedings because the manager of the family there was not the father. It is not the form of the decree or the frame of the suit but the nature of the debt that determines the son's liability. If it is neither illegal nor immoral, then all that the son can claim for the protection of his interest is an opportunity to show that the debt for which the decree was passed was not binding on him. As the plaintiffs have had such opportunity in these proceedings but have failed to prove that the debt due to the bank was not binding on them, they cannot claim that the sale of the suit house is invalid as against them. In *Minakshi Naidu* v. *Immudi Kanakaramayya Goundan*[5], the Privy Council upheld a sale of family property including the son's share in execution of a decree obtained against the father by a *bona fide* holder of a promissory note when the son failed to show that the debt was in its inception illegal or immoral, though the point was not specifically raised, the respondent (son) being unrepresented.

As regards the second contention that the Court had no jurisdiction to sell the house as the attachment had ceased, it is to be observed, that this Court has held in a series of cases that a sale of immovable property without previous attachment is not null and void and that the omission to attach before the sale is only an irregularity which renders the sale liable to be set aside if substantial injury is proved. *Ramaswami Naick* v. *Ramaswami Chetti*[6], *Velayudhan Muppan* v. *Subramania Chetti*[7], *Sivakolanda Pillai* v. *Ganapathi Iyer*[8]. Mr. Sitarama Rao, however, urged that these

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1. (1918) 36 M.L.J. 429 : L.R. 46 I.A. 33 : I.L.R. 46 Cal. 663 (P.C.).
2. (1938) 1 M.L.J. 378 : I.L.R. 1938 Mad. 568 (F.B.).
3. (1937) 1 M.L.J. 543 ; I.L.R. 1937 Mad. 299.
4. (1942) 2 M.L.J. 691 : I.L.R. 1943 Mad. 248 (F.B.).
5. (1888) L.R. 16 I.A. 1 : I.L.R. 12 Mad. 142 (P.C.).
6. (1907) 17 M.L.J. 201 : I.L.R. 30 Mad. 255 at 264.
7. (1912) 24 M.L.J. 70.
8. 1917 M.W.N. 89.

decisions could not be regarded as good law in view of the decision of the Privy Council in *Thakur Barhma* v. *Jiban Ram Marwari*[1]. Though the case in *Sivakolanda Pillai* v. *Ganapati Iyer*[2] was decided after the Privy Council decision referred to above, no reference to it is made in the judgment. The question again arose in *Subramania Iyer* v. *Krishna Iyer*[3] and Madhavan Nair, J., (as he then was) considered the effect of the Privy Council ruling and expressed the view that it did not affect the authority of the previous decisions, but the other learned Judge Spencer, J., decided the case on another point. We have therefore to see whether the proposition contended for by Mr. Sitarama Rao is deducible from the decision of their Lordships. There the decree-holder, applied for attachment and sale of a six annas share of a certain village belonging to the judgment-debtor, describing it as subject to a mortgage. The property thus described was attached and sold in public auction in due course. The purchaser, however, claimed that by mistake the property to be sold had been described as subject to encumbrance while it was really intended to sell six annas out of the unencumbered ten annas, and that a certificate should be granted correcting the alleged mistake and this was done. Their Lordships set aside that certificate, holding that it was not a case of mere misdescription of the property sold but of ordering the sale of one property accurately described and selling a different property, which was beyond the powers of the Court. It was in that context that Lord Moulton delivering the judgment of the Board observed :

> " Their Lordships are of opinion that this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is conclusively described in and by the schedule to which the attachment refers. In the present case that property was six annas subject to an existing mortgage. The effect of the certificate of sale granted by the order of the Subordinate Judge is to make the sale that of a property not attached, namely, the six unencumbered annas—a property which could not be sold in such proceedings inasmuch as it was not the property attached."

These observations are relied on as authority for the proposition that the Court has no jurisdiction to sell property which is not under attachment and a sale without previous attachment is void. As we read the judgment, however, it affords no support to that proposition. All that was decided was that the Court had no power to sell any property other than the one attached and proclaimed for sale to the public. The key-note of the judgment is contained in the sentence :

> " They (decree-holders) could not turn an authority to sell one property into an authority to sell another and a different one."

The attachment was brought in merely to emphasise that the property sold was different from the one offered in sale. We do not think that the decision implies that a subsisting attachment is an essential condition of a valid judicial sale in the sense that without it the sale would be a nullity.

On the other side, Mr. Ramaswami Iyer for respondent contended that attachment was only a measure of protection for the decree-holder and the execution purchaser and had nothing to do with the jurisdiction of the Court to sell the judgment-debtor's property on application by the decree-holder, and that a sale without attachment was perfectly valid. Learned Counsel relied on *Namdevkrishna* v. *Govardhan Nanabhai*[4], where Beaumont, C.J., delivering the judgment of the Court expressed the view that Order 21, rules 30 and 64 should not be so construed as to limit the power of the Court under section 51 (*b*) to sell without attachment. In view, however, of the decisions of this Court to which we have already referred and which are binding on us we cannot accept this extreme contention of Mr. Ramaswami Iyer. The position therefore is this : Attachment is a necessary preliminary to a judicial sale, but a sale without attachment is not a nullity. Omission to attach is a material irregularity which renders the sale liable to be set aside under Order 21, rule 90, if substantial injury is proved.

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1. (1913) 26 M.L.J. 89 : L.R. 41 I.A. 38 : I.L.R. 41 Cal. 590 (P.C.)
2. 1917 M.W.N. 89.
3. (1925) 51 M.L.J. 172.
4. I.L.R. (1939) Bom. 420.

Are the plaintiffs then entitled to avoid the sale to Sundararaja Pillai so far as their shares are concerned? Their father, the first defendant, failed to take any steps to have the sale set aside under Order 21, rule 90, on account of the irregularity, presumably because no substantial injury had resulted. Nor did they avail themselves of that remedy which was open to them also as persons "whose interests are affected by the sale". (See *Bubaneshwar Prasad Narayan Singh* v. *Biharilal*[1].) Even in the present proceedings they have not attempted to prove any substantial injury by reason of the attachment having ceased to be in force at the time of the order for sale.

If omission to attach does not affect the jurisdiction of the Court to sell and is a mere irregularity, the purchaser's title cannot, as it seems to us, be displaced by any antecedent irregularity in publishing or conducting the sale except by resort to the statutory remedy provided by Order 21, rule 90. That remedy not having been availed of, the purchaser's title has become unassailable and the appeals must fail. The respondents will have their costs in the appeal. One advocate's fee.

K.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

The Public Prosecutor .. *Appellant**

v.

Modi Kondayya .. *Respondent.*

Madras Prevention of Adulteration Act (III of 1918), sections 2 and 5 (1) (d) and Rules framed under—Rule 29—Applicability of the Act to sale of "hot milk" as opposed to raw milk—Sale of "hot milk" adulterated with water and deficient in milk fats and solids—If an offence—Intention in adding water—Relevancy—Knowledge of purchaser as to fact of adulteration—If affects question of liability for adulteration.

A vendor who sold "hot milk" which was found on analysis not to be of the nature, substance and quality prescribed by the rules framed under the Madras Prevention of Adulteration Act, 1918, was prosecuted for an offence under rule 29 of the rules framed under the Act. It was contended on behalf of the accused that no offence was committed inasmuch as the Act did not apply to the case of the sale of "hot milk" and that water was added to the milk only to prevent its boiling over in the heating and that the purchaser knew that water was added to the milk sold.

Held, negativing the contention, that having regard to the definition of milk in section 2 of the Act, milk does not cease to be milk within the meaning of the Act when it is sold as "hot milk." The Act itself makes no distinction between raw and hot milk and provides no exception in the case of hot milk. "Hot milk" is under the Act nothing but milk in its natural condition which has been made hot and it should contain the prescribed minima of milk fat and milk solids. When it is found that on account of adulteration with water or abstraction, the prescribed percentages diminished, the person who sells that milk whether in raw state or as "hot milk" infringes the prohibition contained in section 5 (1) (*d*) of the Act read with rules 19, 20 and 27 and is punishable under rule 29 (*a*) as also under section 5 (1) (*d*) of the Act.

The material provisions of the Act do not postulate that for establishing the offence of adulteration it is either necessary to prove that the intention was to increase the bulk or measure or to debase the quality or that the intention was of a fraudulent nature. Hence the fact that the vendor of "hot milk" added water to the milk merely to prevent its boiling over in heating cannot affect the question of the liability for the adulteration. Nor is the knowledge and awareness of the purchaser that water is added to the milk material, as the object and policy of the statute is to protect the public by prohibiting the sale in any circumstances of adulterated milk or milk which did not come up to the prescribed standard of purity.

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1. (1935) I.L.R. 14 Pat. 436.

* Crl. App. No. 268 of 1946. 3rd September, 1946.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Stationary Sub-Magistrate of Narsapur in C.C. No. 1703 of 1945 on his file.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for Appellant.

B. T. Sundararajan appearing as *amicus curiae* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by the Public Prosecutor against the acquittal of the respondent by the Stationary Sub-Magistrate of Narsapur of the alleged offence of adulterating milk, an offence punishable under rule 29 of the rules framed under the Madras Prevention of Adulteration Act, 1918 (hereinafter called the Act). As the respondent was not represented and the matter was of some public importance, Mr. B. T. Sundararajan was appointed *amicus curiae* and I am obliged to him for the valuable assistance rendered by him.

The case brought by the Municipality of Palacole against the respondent who is a milk vendor, was that he was in possession, for the purpose of sale, of buffalo's milk which had been adulterated by the addition of 13 per cent. of water. A sample of the milk was obtained by the Sanitary Inspector, P.W. 1 who, aftre complying with the prescribed formalities, sent it to the Government Analyst who in his certificate Ex. F, gave the opinion that the sample sent to him contained milk which had been deprived of fat to the extent of at least 61 per cent. and that the proportion of the milk was not more than 87 per cent. while the added water was at least 13 per cent. He also stated in his opinion that the sample contained only 1.5 per cent. of milk fat and 7.8 per cent. of milk solids other than milk fat, as against the prescribed percentage of 4.5 per cent. of milk fat and 9 per cent. of milk solids. The accused merely denied the offence although at a later stage he also pleaded that the milk belonged to Vanga Ramamurthi under whose orders he was delivering it to P.W. 3's coffee hotel. That plea was rightly rejected by the Magistrate. The Magistrate found it established in the evidence that the milk which was supplied to P.W. 3 by the respondent and whose sample was taken by the Sanitary Inspector P.W. 1 was boiled milk and not raw milk. He was of the view that before and during boiling it was necessary to add water to prevent the milk boiling over and that therefore the adulteration in this case of 13 per cent. of water was not "to increase the bulk or measure or to debase the quality of milk." He found that the accused could not be "classed with milk vendors who sell raw milk fraudulently added with water to increase its measure", and in that view, he acquitted the accused.

It must, at the outset, be pointed out that the Magistrate was not justified in introducing as a rest of liability the purpose for which adulteration was effected and further of importing into it the element of an intention to commit fraud. The material provisions do not postulate that for establishing the offence of adulteration it is either necessary to prove that the intention was to icrease the bulk or measure or to debase the quality or that the intention was of a fraudulent nature. In another place in his judgment, the learned Magistrate seems to express the view that since in this case it is not raw milk but hot milk that was being sold, the provisions of the Act did not apply. It is against this view of the Magistrate that the present appeal is essentially directed.

Milk is defined in section 2 of the Act as meaning the

"normal clean secretion drawn from the udder of a healthy cow or buffalo either completely, or, after the first portion of such secretion has been drawn off, to completion."

Under section 5 (1) (*d*) it is provided that every person who offers for sale or sells milk which is not up to the standard of purity prescribed by the Local Government shall be punished for the first offence with fine which may extend to one hundred rupees and for every subsequent offence with fine which may

extend to five hundred rupees. Under section 20 (2) the power of making rules under the Act has been given to the Local Government for the following among other purposes :

"(f) prohibiting or regulating in the interest of public health,

(i) the addition of water or other diluent or adulterant to any food;

(ii) the abstraction of any ingredient from any food; and

(iii) the sale of any food to which such addition or from which such abstraction has been made or which has been otherwise artificially treated."

In the rules framed under the Act, the following rules are material to the issue in this case.

"RULE 27 : No person shall add any water, or any skimmed or separated milk to milk intended for sale and no person shall either by himself or by any servant or agent sell or offer or expose for sale, and no person shall have in his possession for the purpose of sale any milk to which any such addition has been made."

"RULE 29 : Whoever commits a breach of any of the rules in this part shall be punishable—

(a) in the case of a first conviction, with fine which may extend to one hundred rupees, and

(b) in the case of a subsequent conviction, with fine which may extend to five hundred rupees."

With regard to the standard of purity referred to in section 5 (1) (d) of the Act, the rules relating to the standard prescribed for buffalo's milk are rules 19 and 20 which are in these terms :

"RULE 19 : Where a sample of buffalo's milk (not being sold or offered for sale as skimmed or separated milk) contains less than 4.5 per cent. of milk fat, it shall be presumed for the purposes of the Act, until the contrary is proved that the milk is not genuine, by reason of the abstraction therefrom of milk-fat, or the addition thereto of water."

"RULE 20 : Where a sample of buffalo's milk whether sold, or offered for sale as buffalo's milk or as skimmed or separated buffalo's milk, contains less than 9 per cent. of milk solids other than milk fat, it shall be presumed for the purposes of the Act, until the contrary is proved that the milk is not genuine by reason of the addition thereto of water."

I have already mentioned with reference to Ex. F the Government Analyst's certificate, that as against 4.5 per cent. of milk fat and 9 per cent. of milk solids prescribed under the foregoing rules, the percentage in the case of milk taken from the respondent was 1.5 per cent. of milk fat and 7.8 per cent. of milk solids. There can be no question therefore that the milk sold by the respondent was not of the nature, substance and quality prescribed under the rules and was not up to the standard of purity prescribed by the Local Government.

The distinction sought to be drawn however was on the basis that the respondent did not pretend to sell milk in the same state as it came from the buffalo ; but he sold it as hot milk to which it was essential to add some water and in this connection attention was drawn to the evidence of P.W. 3 himself who stated that he was aware that it was boiled milk, that it was milk with water added and that with that knowledge he purchased the milk. The knowledge and awareness of P.W. 3 are wholly immaterial as the object and policy of the statute is to protect the public by prohibiting the sale in any circumstances of adulterated milk or milk which did not come up to the prescribed standard of purity. The only question then is whether it ceases to be milk within the meaning of the Act when it is sold as hot milk. *Prima facie* it does not, having regard to the definition of milk in the Act. The Act itself makes no distinction between raw and hot milk and provides no exception in the case of hot milk. To recognise and give effect to any such exception on *a priori* grounds would be contrary to the spirit and intendment of the Act and the rules and would enable a milk vendor to adulterate milk to any extent he pleases and escape libaility altogether by merely applying some heat to the milk.

Although there is a mass of English decisions under the Sale of Food and Drugs Acts concerning the several varieties of milk—new, sweet, skimmed, separated, dried, condensed, etc.—(the Madras Act does not notice any such distinctions),

there appears to be only one case which has dealt with hot milk and that is *Harrington* v. *Slater*[1]. In that case, the appellant had asked the respondent to supply him with a glass of hot milk, which she did. The milk was deficient in fats. The Justices held that no offence was committed relying upon an earlier decision in *Lane* v. *Collins*[2], which was a case of skimmed milk. It was contended for the respondent in the Court of Appeal that the milk had ceased to be milk in the commercial sense, that the appellant asked for hot milk and received hot milk and that hot milk need not comply with the Regulations. For the appellant it was argued that the respondent should have supplied the appellant with milk in its natural condition, but which had been made hot. The latter contention prevailed. In the leading judgment, Earl of Reading, C.J., raised the question whether when a purchaser asked for a glass of hot milk and was served with hot milk which had been adulterated, there had been a delivery to him by the sellor of milk of the nature, substance and quality demanded. Referring to *Lane* v. *Collins*[2], he pointed out that since that decision, the Sale of Milk Regulations, 1901, had come into force which provided the requisite percentage of fat and milk solids that should be found in merchantable milk. Darling J., who was a party to this decision, said :

> "The Justices have decided that no offence has been committed on the ground that when the appellant asked for hot milk he was supplied with what he asked for, when in fact all the respondents supplied him with was milk which had ceased to be milk owing to the deficiency of necessary constituents."

These observations forcibly apply to the present case and from the judgment of the Chief Justice it is clear that *Lane* v. *Collins*[2], upon which the justices had relied was wrongly decided. I may point that the decision in *Lane* v. *Collins*[2], which was given in 1884 was under the Sale of Food and Drugs Act of 1875, which has since been repealed. The Act now in force in England is the Sale of Food and Drugs Act of 1938. In section 20 (1) of that Act milk is defined to mean milk intended for sale or sold for human consumption, or intended for manufacture into products for sale for human consumption. In section 100 (2) (*a*) of that Act, it is provided that any reference to milk shall be construed as including a reference to cream and to separated milk but not as including a reference to dried milk or condensed milk. The standard quality of milk is prescribed under what are called the Sale of Milk Regulations. In *Harrington* v. *Slater*[1], reference was made to the Regulations of 1901 which were said to have superseded the decision in *Lane* v. *Collins*.[2] Those Regulations have from time to time been changed and the Regulations now in force are the Sale of Milk Regulations of 1939 (printed at page 257 of Bell's Sale of Food and Drugs, 11th edition). The 1939 Regulations prescribe that a sample of milk must contain at least 3 per cent. of milk fat and 8.5 per cent. of milk solids which precisely corresponds to the percentages prescribed under the Madras Act with regard to cow's milk. The important point to be noted is that neither in the English Sale of Food and Drugs Act nor under the Sale of Milk Regulations nor under the Milk and Dairies Regulations 1926 to 1943 is it contemplated that hot milk should be treated as anything different from milk in the ordinary sense.

Hot milk is, thus both in the English law and under the Madras Act nothing but milk in its natural condition which has been made hot and it should contain the prescribed minima of milk fat and milk solids. When it is found that on account of adulteration with water or abstraction, those percentages diminished and that the sample taken of the adulterated milk disclosed that in the place of 4.5 per cent. there was only 1.5 per cent. of milk fat, there can be no doubt that the person who sold the milk, whether in raw state or as hot milk, infringed the prohibition contained in section 5 (1) (*d*) of the Act read with rules 19, 20 and 27 and is punishable under rule 29 (*a*) as also under section 5 (1) (*d*) of the Act. In my opinion, the Magistrate came to an erroneous conclusion as to the effect and scope of the material provisions of the Act and the Rules.

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1. 90 L.J.K.B. 265.
2. (1884) 14 Q.B.D. 193.

The appeal must be allowed and the acquittal of the respondent must be set aside. The respondent is convicted under section 5 (1) (*d*) of the Madras Prevention of Adulteration Act, 1918, and rule 29 (*a*) of the Rules framed under that Act. With regard to the sentence, I have to take into account the fact that P.W. 3 who is a coffee hotel-keeper deposed that what he wanted was boiled milk adulterated with water and that he was aware of the fact that he was purchasing such impure milk. Further the object of the Public Prosecutor in filing this appeal was mainly to obtain the ruling of this Court as to the applicability of the Act to hot milk. In view of these considerations, the sentence need not be as severe in this case as ordinarily it has to be in such cases. I sentence the respondent to pay a fine of Rs. 15 in default to suffer simple imprisonment for one week.

V.S. ——— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE RAJAMANNAR.

P. Ramakrishna Ayyar and Brothers by Partner, P. Narayana Pattar .. *Petitioner**

v.

Mandayapurath Unni Moopan .. *Respondent.*

Provincial Small Cause Courts Act (*IX of* 1887), *section* 35 (1)—*Applicability—Reduction in the pecuniary jurisdiction of the Judge of Small Cause Court after passing of decree—Application for execution of that decree—Proper forum.*

Subsequent to the passing of a decree in a small cause suit on 17th February, 1933, for Rs. 247-14-3 the pecuniary jurisdiction of that Munsiff in small cause matters was reduced to Rs. 100. On the 9th August, 1935, the decree-holder applied under section 39, Civil Procedure Code, for permission to execute the decree on the original side of the Subordinate Court and for an order directing the transmission of the decree to the District Munsiff for execution. On the 30th September, 1935, the Subordinate Judge directed the decree to be transferred as prayed for. As the decree-holder did not take steps to execute the decree it was eventually returned to the Court of the Subordinate Judge. Subsequently on 29th August, 1938, the decree-holder filed another application in the Subordinate Judge's Court similar to the one filed on 9th August, 1935, and on the 1st October, 1938, the Subordinate Judge again ordered the transfer of the decree to the District Munsiff. On the 24th September, 1941, the decree-holder applied to the Subordinate Judge's Court for an order in execution. On its rejection, the decree-holder applied to the District Munsiff on 1st October, 1941, for an order of attachment in execution, but as he did not proceed with the matter, the application was closed on 6th January, 1942. The decree-holder thereafter filed on 17th November, 1943, in the District Munsiff's Court another petition for execution. It was rejected as barred by limitation inasmuch as the proceedings before the Subordinate Judge were all invalid because the power to execute the decree remained throughout only in the District Munsiff's Court. In revision,

Held, that according to the provisions of section 35 (1) of the Provincial Small Cause Courts Act which relate to all proceedings, whether before or after the decree, in a small cause suit where the Court has ceased to have jurisdiction in the case, that Court cannot continue to exercise jurisdiction in the case which came before it when in possession of those powers. All further proceedings in such case must be taken in the Court which would have jurisdiction if the suit were then about to be instituted. There is no justification for reading this section as excluding proceedings in execution. Hence the proceedings taken by the decree-holder in the Subordinate Judge's Court were all valid and the decree-holder was entitled to ask for execution of the decree transferred to the District Munsiff for execution.

Zamindar of Vallur and Gudur v. *Adinarayudu*, (1896) I.L.R. 19 Mad. 445, approved.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court, South Malabar at Calicut, dated 19th February, 1945, in A.S. No. 337 of 1944 (E.P. No. 1511 of 1943 in S.C.S. No. 450 of 1932, District Munsiff Court, Tirur).

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* C. R. P. No. 1349 of 1945. 29th July, 1946.

S. R. Subramania Aiyar for Petitioner.

B. Pocker for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This petition raises the question whether the Division Bench which decided the reference in *Zamindar of Vallur and Gudur* v. *Adinarayudu*[1], correctly interpreted the effect of section 35 (1) of the Provincial Small Cause Courts Act, 1887, in respect of execution proceedings. The interpretation which was placed upon the section has been accepted by this Court for half a century and we see no reason to read it in a different way.

On the 17th February, 1933, the petitioner obtained a decree in a small cause suit tried by the District Munsiff of Tirur. At that time the District Munsiff had jurisdiction to try small cause suits up to the value of Rs. 300. The decree was for Rs. 247-14-3. After the decree had been passed the pecuniary jurisdiction of the District Munsiff in small cause matters was reduced to Rs. 100. This was the position when the decree-holder sought to execute the decree on the 9th August, 1935.

Section 35 (1) of the Provincial Small Cause Courts Act reads as follows :

> "Where a Court of Small Causes, or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction, might have been had therein, may be had in the Court which, if the suit out of which a proceeding has arisen, were about to be instituted, would have jurisdiction to try the suit."

The decree-holder read the section as applying to proceedings in execution in view of the wrods " anv proceeding in relation to the case, whether before or after decree." In these circumstances he decided to apply to the Subordinate Judge of Calicut to execute the decree which was for an amount then beyond the pecuniary jurisdiction of the District Munsiff's Court. Accordingly on the 9th August, 1935, he applied under section 39, Civil Procedure Code, for permission to execute the decree on the original side of the Subordinate Court and for an order directing the transmission of the decree to the District Munsiff for execution. It is admitted that, if the Court having jurisdiction to execute the decree was the Subordinate Court, the Subordinate Judge had power to transfer the decree for execution to the District Munsiff, notwithstanding the reduction of the pecuniary jurisdiction of his Court in small cause suits. The Subordinate Judge granted the application of the decree-holder and by an order dated the 30th September, 1935, he directed the decree to be transferred to the Court of the District Munsiff for execution. Unfortunately, the decree-holder did not take steps to execute the decree and eventually it was returned by the District Munsiff to the Court of the Subordinate Judge.

On the 29th August, 1938, the decree-holder filed another application in the Subordinate Court. This was a similar petition to that filed by him on the 9th August, 1935. Again the Subordinate Judge took the application on his file and ordered its transfer to the District Munsiff's Court. In this case the order was passed on the 1st October, 1938. On the 24th September, 1941, the decree-holder applied to the Subordinate Court for an order in execution. This application was rightly rejected on the ground that the decree had already been transferred to the District Munsiff's Court for execution. On the 1st October, 1941, the decree-holder applied to the District Munsiff for an order of attachment in execution, but he did not proceed with the matter and the application was " closed " on the 6th January, 1942. On the 17th November, 1943, he filed in the Distirct Munsiff's Court another petition for execution. This is the application which has given rise to the revision petition now before the Court.

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1. (1896) I.L.R. 19 Mad. 445.

The District Munsiff held that the application for execution was barred by limitation. In his opinion the proceedings before the Subordinate Judge were all invalid because the power to execute the decree remained throughout in the District Munsiff's Court, notwithstanding the reduction in its small cause powers. If this were the position, the petition for execution filed on the 17th November, 1943, was certainly out of time. On appeal the District Judge of South Malabar agreed with the District Munsiff. He considered that the decision of the Calcutta High Court in *Abdus Sattar* v. *Mohini Mohan Das*[1] was directly in point and that it correctly stated the law. The decree-holder then applied to this Court to revise the District Judge's order. The petition has been placed before a Full Bench for decision as it involves an important question of law.

In *Zamindar of Vallur and Gudur* v. *Adinarayadu*[2], a District Munsiff made a reference to this Court under section 617 of the Civil Procedure Code, 1882, which corresponds to Order 46, rule 1 of the present Code. The facts there were on all fours with the facts in the present case, except that there the extended powers of the District Munsiff had been completely withdrawn. In making the reference, the District Munsiff expressed the opinion that by reason of section 35 (1) of the Provincial Small Cause Courts Act, 1887, he had no jurisdiction to hear an application for execution of a decree passed in a small cause suit when the Court had lost its small cause powers. The opinion was accepted by this Court in these words :

> " We are of opinion that execution proceedings in such suits must be had in that Court in which the jurisdiction now vests, that is the Subordinate Judge's Court."

The parties were not represented at the reference and therefore the Court had not the advantage of hearing counsel. The question has, however, been fully argued before us.

As we have seen, section 35 (1) relates to all proceedings, whether before or after the decree, in a small cause suit where the Court has ceased to have jurisdiction in the case. All further proceedings must be taken in the Court which would have jurisdiction if the suit were then about to be instituted. In our opinion, there is no justification for reading this section as excluding proceedings in execution. Execution is a proceeding after decree. If the Legislature had intended execution proceedings to be excluded from the purview of the section, it would surely have expressed itself differently. Moreover, section 35 of the Provincial Small Cause Courts Act has much in common with section 37 (*b*) Civil Procedure Code and Section 37 (*b*) relates only to execution.

It is well settled law, so far as this Province is concerned, that subsequent loss of territorial jurisdiction does not prevent the Court which passed the decree from executing it. See *Ramier* v. *Muthukrishna Iyer*[3], where all the earlier cases were discussed. A Bench of the Calcutta High Court applied the same principle in *Abdus Sattar* v. *Mohini Mohandas*[4]. This is the case on which the District Judge relied. We consider that he was not justified in so doing. The Calcutta High Court was not considering the effect of section 35 (1) of the Provincial Small Cause Courts Act. It was considering the effect of section 37, Civil Procedure Code in ordinary suits. In the case now before us the Court is not concerned with the question whether the principle in *Ramier* v. *Muthukrishna Iyer*[3], can be applied in a case falling under section 37, Civil Procedure Code. The only section which has application is section 35 of the Provincial Small Cause Courts Act, and it says in words which leave no room for doubt that where a Court with small cause powers has lost such powers, it cannot continue to exercise jurisdiction in a case which came before it when in possession of those powers. By reason of this section the decree-holder had no other course open to him on the 9th August, 1935, than to apply for execution to the Court of the Subordinate Judge. This he did, and

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1. A.I.R. 1933 Cal. 684. (F.B.).
2. (1896) I.L.R. 19 Mad. 445.
3. (1932) 62 M.L.J. 687 : I.L.R. 55 Mad. 801
4. A.I.R. 1933 Cal. 684.

having obtained permission to execute the decree on the original side of that Court he rightly obtained an order transferring it to the District Munsiff's Court for execution. It follows that we hold that *Zamindar of Vallur and Gudur* v. *Adinarayudu*[1] was correctly decided and that it governs this case.

The result is that the revision petition is allowed and the case remanded to the District Munsiff's Court with directions to the District Munsiff to hear and decide the application for execution filed on the 17th November, 1943, in the light of this judgment. The petitioner is entitled to his costs in the District Court and in this Court. The costs in the District Munsiff's Court will abide the result of the application for execution.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE RAJAMANNAR.

T. S. Dorairaj .. *Appellant**

v.

S. R. Lakshmi *alias* Rajalakshmi .. *Respondent.*

Guardians and Wards Act (VIII of 1890), section 25—Illegitimate child by continuously kept concubine of Sudra—Father if entitled to custody in preference to the mother.

The father of an illegitimate son has no right to the custody of the person of that son during his minority. A mere obligation to maintain cannot of itself confer a right to the custody of the minor who is to be maintained. The right of the putative father to the custody of the person of the illegitimate son by a continously kept concubine does not necessarily flow either from the duty to maintain the son or from the fact that the son has a limited right of inheritance to the putative father. It might perhaps be put on the ground that amongst Sudras an illegitimate son by a regularly kept concubine is regarded for all purposes as a member of the family though of a somewhat inferior grade to an ordinary son. Where, however, the association between the father and mother lasted only for four years and then completely broken the position will be different and the father has no right of guardianship either from the liability to maintain or from the heritable relationship or from the constitution of the family.

On appeal against the order of the Hon'ble Mr. Justice Kunhi Raman dated 16th August, 1946, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. P. No. 121 of 1946.

B. Sitarama Rao and *V. Rajagopala Mudaliar* for Appellant.

K. Gopalaswami and *G. Venkataraman* for Respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—This appeal arises out of an application under section 25 of the Guardians and Wards Act preferred by the present respondent in which she prays for an order for the restoration of the custody of her minor son of whom the appellant is admittedly the father. The facts are not seriously in dispute. Both the appellant and the respondent are cinema artists, the appellant apparently being a man of importance in the cinema world and the respondent being comparatively unimportant. In 1941, they met in the course of their profession and the appellant took the respondent into his house as his concubine. She lived with him at Madura in a house in which the appellant's wife was also living. In March 1943, the child with whose welfare we are now concerned was born and at or about the time of its birth the appellant added to his household the younger sister of the respondent who also became his concubine. In 1945 relations between the appellant and the respondent became strained. The two of them went along with the child to Madras where the respondent's mother had met with

1. (1896) I.L.R. 19 Mad. 445.

* O. S. A. No. 24 of 1946. 5th September, 1946.

an accident. The respondent stayed in Madras to look after her mother and the child stayed with her. The appellant returned to Madura. Then there was a definite quarrel between the appellant and the respondent. The respondent refused to return to the appellant and the appellant managed to get possession of the child. Hence the present petition which appears to have been brought after an abortive attempt made by the respondent to get maintenance from the appellant.

Now on these facts the respondent contends that she is entitled to the custody of her child, while the appellant objects that the child is his son and he is its lawful guardian. The child is now a little over three years of age. It has been held by the learned trial Judge that the respondent as the mother of the child is *prima facie* entitled to its custody and that it is in the best interests of the child, notwithstanding the criticisms which may be levied against the character of the mother that she should have charge during the next two years when the child would depend naturally upon its mother. Thereafter, it is suggested, it will be possible to send the child to some institution where it might be free from the undesirable associations which might threaten it in the mother's custody.

In appeal Mr. Sitarama Rao has contended that the respondent must be deemed to have been a regularly kept concubine of the appellant and that the relationship was sufficiently continuous to entitle the son to be regarded, the parties being Sudras, as the son of the appellant by a permanently kept concubine and therefore entitled to the limited right of inheritance which the law gives to such a son. He contends further that the relationship is not merely that of a son to the father but also that of a father to the son relying upon the decision in *Subramania Ayyar* v. *Rathanvelu Chetty*[1], where it was held that the father of an illegitimate son by a permanently kept concubine could in a Sudra family inherit to his son. The contention is that if the illegitimate son stands as the son of his father for the purpose of inheritance and the purpose of maintenance, there is every reason why the father should have his natural right of guardianship over the son.

There is singularly little authority on the subject. It is not disputed that in an ordinary case the mother of an illegitimate child has a right to the custody of that child during the years of nurture. This has been recognised in many cases, of which *Venkamma* v. *Savitramma*[2], is an example, though that, of course, was not a case of a dispute between the mother and the putative father. *Mussammat Prem Kuar* v. *Banarsi Das*[3] was a case of an application under section 25 of the Guardians and Wards Act by a putative father for the custody of the child of his regularly kept concubine. The judgment of Bhide, J., in this case contains certain observations which have been quoted in certain text books as authority for the proposition that when the relationship is such as would make the father responsible for the maintenance of the son, the father would have the right of guardianship of the person of the illegitimate son. The learned Judge describes this as "the ordinary rule" according to Sri Hari Singh Gour. We are informed that in the edition of Gour's Hindu Law from which this principle was extracted the only authority cited was a certain decision of the Chief Court of Burma. We have not got that edition before us, but we note that in the present edition of Gour's Hindu Law the same rule is propounded, the only authority quoted for it being the Lahore case just cited.

It seems to us that the mere obligation to maintain cannot if itself confer a right to the custody of the minor who is to be maintained. For instance a Hindu whose undivided brother dies leaving a widow and minor children would be under an obligation to maintain the minor children, but the right to the custody of the person of those minors would be with the widow and not with the uncle. Similarly the mere existence of a heritable relationship between the putative father and the son would not of itself necessarily carry with it a right of guardianship, during the minority of the illegitimate son. There are numerous well-recognised rights of inheritance which do not carry with them a right of guardianship of the person of

1. (1917) 33 M.L.J. 224 : I.L.R. 41 Mad. 44 (F.B.).
2. (1889) I.L.R. 12 Mad. 67.
3. (1933) I.L.R. 15 Lah. 630.

the heir. An obvious example is the case of a grandfather and a grandson. It seems therefore that the right of the putative father to the custody of the person of his illegitimate son by a regularly kept concubine does not necessarily flow either from the duty to maintain the son or from the fact that the son has a limited right of inheritance to the putative father. It might perhaps be put on the ground that amongst Sudras an illegitimate son by a regularly kept concubine is regarded for all purposes as a member of the family though of a somewhat inferior grade to an ordinary son. But here there is a difficulty. In the present case the association between the father and the mother lasted only for four years and is now completely broken. If the right of inheritance rests on the permanent nature of the alliance between the father and the mother, there would be no right of inheritance in the present case. Mr. Sitarama Rao has however pointed out that on the facts as summarised in the judgment in *Sundararajan* v. *Arunachalam Chetty*[1], it would appear that that was a case in which a right of inheritance was recognised when there had been a breach between the putative father and the mother which seems to have enured up to the death of the putative father. The facts of that case are not very fully set forth, but it does seem to us that if the right of the son to inherit in such cases depends only on an association between the father and the mother of sufficient duration as to leave no doubt as to the paternity, the right cannot rest on the basis of any permanent status of the mother and her son in the family of the father.

We are therefore left without any very clear logical basis for inferring in the father any right of guardianship either from the liability to maintain or from the heritable relationship or from the constitution of the family. In a recent case, *Thangavelu* v. *Court of Wards, Madras*[2], Patanjali Sastri and Bell, JJ., had to consider the relative position of the illegitimate son of a Sudra by a permanently kept concubine in the matter of the right of inheritance to an impartible estate *vis a vis*, the widow of the late zamindar. In arriving at the conclusion that the widow would inherit in preference to the illegitimate son, Patanjali Sastri, J., observed:

> "It is pertinent here to point out that the illegitimate son is not included among the twelve categories of sons enumerated by Yagnavalkya in verses 128-132 but is separately mentioned in a special text. In commenting on verses 135 and 136 which prescribes the order of succession to the estate of a 'sonless' person, (*aputraya*) the Mitakshara observes:
>
> "A sonless person is he who has no son of any of the aforesaid *twelve* categories." (II-1. 3).
>
> It will thus be seen that illegitimate son is not among the principal and secondary sons to whom the heirs enumerated in Chapter II are postponed, but stands apart with his rights, such as they are, defined by a special text."

If it is correct to hold that the position of an illegitimate son of a Sudra by a permanently kept concubine rests solely on special text which recognises some rights of a limited nature and should not be taken as authorising anything in excess of those limited rights, it seems to be very dangerous on *a priori* reasoning to give to that relationship any greater scope than that which can be directly traced to the special text. Therefore, as we cannot see any authority either in the text or in the decided cases for recognising that the father of such an illegitimate son has any right to the custody of the person of that son during his minority, we do not feel disposed on somewhat dubious logical grounds to recognise any such right.

The result therefore is that the appeal is dismissed with costs.

K.S. *Appeal dismissed.*

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1. (1916) 29 M.L.J. 793: I.L.R. 39 Mad. 136. 2. (1946) 2 M.L.J. 143.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Uppuluri Ramamani .. *Appellant**

v.

Yelamanchili Basavayya and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 11—Co-defendants—Suit for partition—Defendant applying for his share—Alienees being Co-defendants—Finality of decision.

In a partition action the sharers are both the plaintiffs and the defendants, and each defendant sharer is also in the position of a plaintiff. Where one of the defendants in fact applies for a decree in respect of his share, and the alienees are arrayed as co-defendants, the decision operates as *res judicata* and cannot again be re-opened in a subsequent suit between the particular defendant whose share was the subject of decision and the alienee-defendants.

Harihar Prasad Singh v. *Narasingh Prasad Singh,* (1940) I.L.R. 19 Pat. 669, relied on.

Appeal against the decree of the Court of the Subordinate Judge, Bezwada, in A. S. No. 23 of 1943, preferred against the decree of the Court of the District Munsiff, Bezwada, in O. S. No. 416 of 1940.

A. L. Narayana Rao for Appellant.

P. Parthasarathi and *D. Munikanniah* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff's suit has been dismissed on the ground that the question was previously decided in O. S. No. 623 of 1935. The plaintiff and her brother were the donees of the suit property under a settlement deed executed by their grandmother's sister, one Achamma. Achamma settled the property on her sister's grandchildren under Ex. P-1 of the year 1905. The plaintiff's brother, Gopalakrishnayya, died in 1922 and thereafter Achamma, the donor, revoked the settlement deed and settled the property on the plaintiff's husband. The husband of the plaintiff alienated the properties to several persons. In the year 1934, Achamma died. In 1935 the plaintiff's brother's widow filed O. S. No. 623 of 1935 for partition and recovery of her share. To that suit she made the present plaintiff as defendant 1 ; her husband was defendant 2 ; her sons were defendants 3 and 4 ; and the alienees were made other defendants. In the written statement filed by defendant 1, she said that her husband's alienations were not binding upon her and asked that she should be given her share in the properties. She offered to pay Court fees, if necessary. The contesting defendants were the alienees and they put forward two contentions. One was that Achamma was entitled to revoke the settlement deed of 1905 and to settle the properties again on the second defendant in that suit. The second point—and that is what is relevant for the purposes of this suit—is that even if the plaintiff in that action was entitled to a share, the first defendant in that suit (the plaintiff in this suit), was not entitled to ask for her share for the reason that she actively co-operated with her husband in the alienations made by him and that she was therefore estopped from questioning the validity of the alienations at any rate, so far as she was concerned. Issue 9 in the previous suit raised the question whether the first defendant in that suit was estopped from questioning the alienations in favour of the contesting defendants. The present plaintiff, her husband, and her sons did not appear at the time of the trial. The District Munsiff who tried the suit recorded a finding on issue 9 and held that the evidence of the defendants' witnesses proved that defendant 1 therein was an active participator in the alienations made by defendant 2 in favour of defendants 6 and 8 to 10 (here the array of parties is that in the previous suit) and accordingly he found the issue for the defendants who raised it. Therefore the finding was that defendant 1 in that suit was estopped from questioning the alienations in favour of the alienees-defendants. This finding clearly operates as *res judicata* in the present suit. Mr.

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*S. A. No. 543 of 1945. 5th April, 1946.

A. L. Narayana Rao, the learned advocate for the appellant, argues that the decision on the question whether the plaintiff in this suit was estopped from questioning the validity of the alienations effected by her husband was not necessary in order to give relief to the plaintiff in the previous action. If this is an ordinary case of co-defendants, then the contention would have been perfectly legitimate. In a case between co-defendants the requirements are laid down by the Judicial Committee repeatedly in *Munni Bibi* v. *Trilokinath*[1] and *Maung Sein Done* v. *Ma Pan Nyun*[2]. But the previous suit was one for partition. In a partition action the sharers are both the plaintiffs and the defendants and each defendant sharer is also in the position of the plaintiff. In fact, the plaintiff in this suit who was defendant 1 in the previous suit expressly asked that the Court should pass a decree in her favour for her share of the properties. It is because she asked for a decree in her favour, the alienees-defendants raised the plea that, even though the plaintiff in that action might be entitled to a share, the first defendant was not entitled because she was estopped for various reasons mentioned by them. This is therefore a case in which the present plaintiff must be deemed to be a plaintiff and the alienees must be taken to be defendants. If they were so arrayed, there is no question about the applicability of the doctrine of *res judicata*. This distinction has been pointed out by the High Court of Patna in *Harihar Prasad Singh* v. *Narasingh Prasad Singh*[3]. There a decision in a previous suit was held to be *res judicata* on the ground that the previous suit was a partition action where one co-sharer defendant asked for a higher share which was resisted by the other co-sharers. In the decision of this question the plaintiff in the previous suit was not at all interested. It was conceded that the decision of the question as to the extent of the co-defendant's share was not necessary in order to give relief to the plaintiff in that action. The learned Judge held that the decision as between the two co-defendants was *res judicata* as the question of the share was expressly decided even though the decision in the former suit was not necessary in order to give relief to the plaintiff in that suit. I agree with that decision and I hold that the plaintiff is precluded by the judgment in the previous suit from re-agitating the claim in the present suit.

The second appeal is dismissed with costs. No leave.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA AND MR. JUSTICE RAJAMANNAR.

K. S. Sundaram Aiyar .. *Appellant**

v.

Ittichathara Valia Mannadiar, Karnavan and Manager of Vadasseri Tarwad and others .. *Respondents.*

Transfer of Property Act (IV of 1882), sections 58, 63-A and 77—Usufructuary mortgage specifying no rate of interest—Mortgagee not advancing full amount of consideration mentioned—Rights of mortgagor to compensation or damages or equities—Personal and not assignable—Court auction purchaser of the property—If entitled to such rights—Mortgagee if bound to account for surplus—Improvements—Mortgagee if entitled to be paid the costs of, before redemption.

An usufructuary mortgage comprised of properties both in Malabar and Coimbatore. The consideration mentioned in the deed was Rs. 5,700 out of which Rs. 1,100 was received in cash by the mortgagors. The balance was to be advanced by the mortgagee to discharge certain debts mentioned in the B schedule to the mortgage deed. The mortgagee was entitled to be in possession in lieu of interest, but liable to pay cist and to pay the mortgagors one para of paddy and Re. 1, only annually. The mortgage amount was payable after 4 years from the date of the document. Item 2 of the B schedule was an amount of Rs. 2,400 being principal, interest and cost, payable by the mortgagors to a bank under a decree. The mortgagee paid Rs. 1,950 in full settlement of the decree and the balance due under the decree was written off by the bank.

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1. (1931) 61 M.L.J. 196 : L.R. 58 I.A. 158 : I.L.R. 10 Rang. 322 (P.C.).
I.L.R. 53 All. 103 (P.C.).
2. (1932) 63 M.L.J. 64 : L.R. 59 I.A. 247 :
3. (1940) I.L.R. 19 Pat. 669.

* Appeal No. 517 of 1944. 24th July, 1946.

In a suit for redemption by the purchaser in Court-auction of the rights of the mortgagors,

Held, (1) The mortgagee is entitled to only Rs. 1,950 in respect of item 2 of schedule B as the mortgagee can in no sense be said to have advanced the full amount of Rs. 2,400. The mortgage must be held to be not supported by consideration to the extent of Rs. 450 in respect of this item plus Rs. 500 paid by the mortgagors themselves to discharge another item in schedule B. (2) But there being no rate of interest specified, proportionate reduction from the rents and profits could not be made and appropriated towards the principal. (3) The rights of the mortgagor to obtain compensation or damages in respect of the failure of the mortgagee to advance the full amount of consideration mentioned in the mortgage, are rights personal to him and a purchaser in Court-auction will not automatically become entitled to such rights of the mortgagor. It is even doubtful if the right of the mortgagor which may sound in damages could be transferred or assigned validly. (4) Whatever may be the right of the mortgagors themselves in equity or on the basis of the mortgagee being a trustee in respect of the surplus rents and profits, such rights will not pass to a purchaser of the mortgaged property at a sale in execution of a decree against the mortgagors. (5) The mortgagee will not be entitled to claim the cost of any improvements made by him as unless there is a contract to the contrary the mortgagor will be entitled to the improvements. The mere fact that the properties in Malabar were included in the mortgage will not carry with it as a customary (now statutory) incident in Malabar, namely, the mortgagee's right to effect and claim the costs of improvements to the mortgaged property.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in O. S. No. 93 of 1942, dated 29th March, 1944.

V. Govindarajachari for *N. R. Sesha Aiyar* for Appellant.

The Advocate-General (*K. Rajah Aiyar*), *K. S. Desikan* and *K. K. Sridharan* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, J.—This appeal arises out of a suit filed by the appellant in the Court of the Subordinate Judge of Coimbatore for redemption of a usufructuary mortgage executed by defendants 1 and 2 in favour of the third defendant on 9th November, 1934 (Ex. D-1). The appellant is the purchaser of a portion of the mortgaged properties in execution of a decree against defendants 1 and 2.

The mortgage comprised properties both in Malabar and in Coimbatore. The consideration mentioned in the deed was Rs. 5,700 out of which Rs. 1,100 was received in cash by defendants 1 and 2. The balance was to be advanced by the mortgagee to discharge certain debts mentioned in the B schedule to the mortgage deed. The mortgagee was entitled to be in possession in lieu of interest, but liable to pay the Government cist and the cist due to the Perur Devastanam and to pay the mortgagors one para of paddy and Re. 1 annually. The mortgage amount was payable after four years from the date of the document. The other provisions of the deed will be referred to later on.

The case for the plaintiff was that though the consideration as mentioned in the deed was Rs. 5,700, the amount actually advanced was only Rs. 4,414-11-10. He further contended that on the taking of proper account, the consideration actually advanced by the third defendant would have been fully repaid. On this footing, the plaintiff also claimed mesne profits. The mortgagee was the contesting third defendant. He denied that there was any failure of consideration and that the mortgage debt was discharged as alleged by the plaintiff. He also claimed that he had made large improvements to the mortgaged property to the extent of nearly 20,000 and claimed that amount to be paid to him before redemption was decreed. So far as the third defendant's claim to improvements was concerned, the plaintiff denied that the third defendant made any improvements and in any event denied liability to pay their cost.

The learned Subordinate Judge found that the mortgage was supported by consideration except to the extent of Rs. 500, that the third defendant was not liable to account to the plaintiff for rents and profits from the property and that the third defendant was entitled to make improvements as per the terms of the mortgage deed and to claim the value thereof before redemption. He assessed the value of the improvements at Rs. 9,399. In the result he passed a preliminary

decree in favour of the plaintiff for redemption on deposit of Rs. 5,200 plus Rs. Rs. 9,399, within three months from the date of the decree. The appeal is filed by the plaintiff.

Mr. Govindarajachari for the appellant pressed three main grounds before us. They are :

(1) That the consideration was not fully paid ; and

(2) That therefore the mortgagee was liable to account for the rents and profits of the land and that in the taking of accounts the mortgagee should be compelled to credit towards the principal a proportionate amount of the rents and profits in excess of the amount which he would be entitled to appropriate towards interest, in which case the mortgage debt would stand discharged ; and

(3) The third defendant was not entitled either in law or in fact to any amount as cost of improvements alleged to have been effected by him.

The details of consideration as set out in the document Ex. D-1 are as follows :

A sum of Rs. 1,100 was received in cash and the balance of Rs. 4,600 was to be utilised by the mortgagee to discharge tarwad debts shown as items. Nos. 1 to 4 in schedule B to the document. According to the plaintiff, the third defendant did not pay the entire amount specified in the schedule in respect of each of the items. His contention as regards item 1 has been accepted by the lower Court. He therefore attacks the findings of the lower Court only in respect of the other three items.

Item 2 of schedule B is an amount of Rs. 2,400 to be paid to Kumareswara Nidhi Bank towards principal and interest and cost as per the decree obtained by them on a promissory note executed by the first defendant. There is no dispute between the parties as to the amount actually paid by the third defendant and that is Rs. 1,950. What appears to have happened is that on payment of this sum, at the request of the third defendant, the balance due under the decree was written off and full satisfaction of the decree was entered up. It is contended for the appellant that the third defendant will be entitled to take into account only this sum of Rs. 1,950 and not the full amount of Rs. 2,400 mentioned in the document. The learned Advocate-General for the mortgagee respondent 3 however contends that as the decree mentioned in item 2 of the schedule was fully discharged, he was entitled to claim credit for the full amount. We consider that the appellant's contention is well-founded. Possibly if the consideration of the mortgage was a mere promise to discharge a particular debt, the mortgagee might succeed ; but when according to the document the liability was in respect of amounts to be advanced by the third defendant for the discharge of a particular debt, the mortgagee will not be entitled to be repaid anything more than what he had actually paid to discharge the debt. The definition of a mortgage in section 58 of the Transfer of Property Act is also against the respondent's contention.

"A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of engagement which may give rise to a pecuniary liability."

There can be no doubt that in the present case the mortgage was for securing the payment of money advanced or to be advanced. The mortgagee, can in no sense, be said to have advanced the full amount of Rs. 2,400. We disagree with the learned Subordinate Judge that the benefit of the remission by the bank should go to the third defendant and that the first defendant must be deemed to have received the full consideration of Rs. 2,400 in respect of the decree. We hold that the third defendant is entitled to only Rs. 1,950 in respect of item 2.

The third item is an amount of Rs. 500 due as cist to the Perur Devastanam for faslis 1342 and 1343 on item 4 of the properties in schedule A to the mortgage deed. The appellant contends that only a sum of Rs. 306-10-2 was paid to the Devasthanam and the third defendant therefore is not entitled to anything more. The third defendant's case was that in addition to the Rs. 306-10-2 paid by him for which he holds a receipt Ex. D-4, he paid into Court Rs. 260-8-0 to set aside a sale for arrears of revenue and that amount was taken away by the first defendant.

The appellant mainly relies on the evidence of P. W. 3, the manager of the Perur Devastanam who produced the accounts for faslis 1348, 1350, and 1352 wherefrom it appears that the arrears of cist for fasli 1343 had not been paid. The lower Court was not disposed to attach much value to the accounts produced and to the evidence of P. W. 3. We see no reason to differ from the conclusion of the learned Subordinate Judge and find that this item of consideration has been fully paid.

The fourth item is a sum of Rs. 560 to be paid to the Janopakara Nidhi Bank, Coimbatore, to discharge the principal and interest due under a promissory note executed by the first defendant. The plaintiff admits that a sum of Rs. 500 was paid to the bank because the third defendant produced Ex. D-3, a receipt by the Nidhi for that amount. The case for the third defendant was that besides this amount he paid a further Rs. 100 into Court on behalf of the first defendant. The lower Court accepted the case of the third defendant and we see no reason to differ from it.

We may now, for the sake of convenience, dispose of the memorandum of objections filed by the third defendant in respect of the amount of Rs. 500 disallowed by the lower Court. This relates to item 1, an amount of Rs. 1,140 to be paid as per decree in O. S. No. 94 of 1933 in the District Munsiff's Court of Palghat obtained against defendants 1 and 2 by one S. R. Subramania Aiyar. On a consideration of the evidence adduced on both the sides, the lower Court found that the third defendant had paid only Rs. 640 towards this decree and the rest of the amount was paid by the first defendant himself and not by the third defendant. We find no reason to differ from this finding of the lower Court.

The result is that the mortgage must be held to be not supported by consideration to the extent of Rs. 500 plus Rs. 450.

On the finding that the mortgage is supported by consideration only to the extent of Rs, 4750, the question that now falls to be considered is whether the third defendant is bound to appropriate any portion of the rents and profits towards the principal amount due. The contention of the appellant is that the third defendant not having advanced the full amount of consideration, will not be entitled to appropriate the entire amount of the rents and profits towards interest, but only a proportionate amount, that is an amount in the ratio of Rs. 4750 : 5,700. The balance left after such partial appropriation would be really amount belonging to the mortgagor and this amount has to be applied in discharge of the principal amount. In support of this contention, he relied on the principle enunciated in section 76 (*h*) of the Transfer of Property Act and on certain decided cases. Section 76 (*h*) of the Transfer of Property Act is in these terms :

> "his (mortgagee's) receipts from the mortgaged property, * * * * * shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (*c*) and (*d*), and interest thereon, be debited against him in reduction of the amount (if any), from time to time due to him on account of interest and so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money ; the surplus, if any, shall be paid to the mortgagor."

Mr. Govindarajachari argues that the interest lawfully due to the mortgagee in this case must be ascertained by a proportionate reduction from the total amount of rents and profits,—a reduction proportionate to the amount not advanced by the mortgagee. The balance then would be receipts, which exceeded the interest due and would therefore have to be applied in reduction and discharge of the mortgage money. We consider that the principle of section 76 (*h*) has no application to a case like the present. It is not possible to say that any particular amount is due as interest under the document because no rate of interest is specified. The mortgagee has to pay the cist due on the lands and should deliver one para of paddy and pay Re. 1 to the mortgagors and appropriate the rest of the receipts towards interest. How the rents and profits should be appropriated depends upon the terms of the mortgage deed and in a case like this " the mortgagee takes his chance of the rents and profits being greater or less than the interest which might have

been reserved by the bond." (See *Partab Bahadur Singh* v. *Gajadhar Baksh Singh*[1]) In our opinion the case is more governed by section 77 of the Transfer of Property Act which runs as follows:

> "Nothing in section 76, clauses (*b*), (*d*), (*g*) and (*h*) applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal."

There is no account to be taken between the mortgagor and the mortgagee when the rents and profits are taken in lieu of interest and that is the present case. In such a case, it is obvious that if in a particular year the mortgagee does not realise the full value of the usufruct, it is the mortgagee and not the mortgagor who suffers. Further when no rate of interest is provided it is very difficult, even in practice, to work out the principle for which the appellant contends. Is it the receipts of each year to be taken into account and a proportionate deduction worked out or has a notional assessment of the rent to be made for that purpose? In cases where a rate is specified, it is easy to ascertain the exact amount due for interest and to deduct such amount from the total receipts to arrive at a surplus. This obviously cannot be done where no rate is specified.

On principle also, we find it difficult to support the contention of the appellant. When a mortgagee fails to advance the full amount of consideration mentioned in the mortgage deed, the rights of the mortgagor are fairly well established. The mortgagor cannot sue to enforce the agreement to lend money. See *Sheikh Galim* v. *Sadarjan Bibi*[2] and *Yadavendra Bhattu* v. *Srinivasa Babhu*[3]. He can obtain compensation or damages in a properly framed suit against the mortgagee for breach of the contract. See *Abdul Hashim Sahib* v. *Kadir Batcha Sahib*[4]. In the case of a usufructuary mortgage, if the mortgagor has not received full consideration, he cannot, if he has parted with possession, claim a return of the proportionate extent of land and mesne profits for such proportion. See *Wahid Ali* v. *Biptu Chamar*[5]. The mortgage being indivisible, such a course is not open to him and the entire property would stand as security for the amount actually advanced.

In any view of the question we are clearly of opinion that the rights of a mortgagor in a case where the entire consideration of the mortgage is not advanced by the mortgagee are rights personal to him and a purchaser in Court auction of the mortgaged property like the plaintiff in the present case, will not automatically become entitled to such rights of the mortgagor. It is even doubtful if the right of the mortgagor which may sound in damages could be transferred or assigned validly. See *Yadavendra Bhattu* v. *Srinivasa Babhu*[3]. No case has been cited before us in which a purchaser has been held to be entitled to such rights.

There is nothing in the case relied on by the appellant's learned Counsel to directly support this contention. In *Rajai Tirumal Raju* v. *Pandla Muthial Naidu*[6] what was actually decided was that where only a part of the consideration for the mortgage was paid but the mortgagee remained in possession of the entire property for more than 12 years, he could not by merely claiming to hold for the full amount, acquire by prescription a right to hold as mortgagee for such full amount. There is only one observation in the course of the judgment which is relied on by the appellant's learned Counsel who admits that it was in no way necessary for the decision of that case. The learned Judges say at page 119:

> 'If the consideration for the mortgage became void to the extent of Rs. 17,000, a proportionate amount of the annual interest would not be payable out of the income fixed, but under section 76 of the Transfer of Property Act, clause 6, the sum was liable to be debited against the mortgagee in reduction of the principal sum due under the mortgage."

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1. (1902) L.R. 29 I.A. 148: I.L.R. 24 All. 521 at 531 (P.C.).
2. (1915) I.L.R. 43 Cal. 59.
3. (1924) 47 M.L.J. 435: I.L.R. 47 Mad 698.
4. (1918) 35 M.L.J. 740: I.L.R. 42 Mad. 20.
5. A.I.R. 1935 Pat. 125.
6. (1911) 21 M.L.J. 169: I.L.R. 35 Mad. 114.

The very next sentence shows that this is only a passing observation, because they say:

> "But whether this is so or not, the question as to what becomes of the available surplus does not affect the relation of the mortgagee."

In *Muhammad Allahyar Khan* v. *Muhammad Samiuddin Khan*[1], the point that was decided was that in a suit for redemption of a mortgage instituted by a purchaser of the property where the plaintiffs disputed the amount of money advanced by the mortgagee to the original mortgagor, the burden of proving the non-receipt of such of the items the receipt of which was admitted in the mortgage deed by the mortgagor was on the plaintiffs; but the receipt of such items which had not been paid at the time of the execution should be proved by the defendants. Dealing with the question how an account should be ordered, the learned Judges decided that the provisions of section 76 of the Transfer of Property Act should be applied and finally directed that profits yearly in excess of the interest from time to time due on the mortgage should go in reduction of the principal due for the time being on that bond. But the important fact to be noticed is that there were two mortgage deeds concerned in that case and under each mortgage there was a definite rate of interest provided (*see* page 266). As we have pointed out, there could be no difficulty in such a case and the mortgagee would be bound to account for the excess over the interest due to him. The decision in *Brahamdeo Narain* v. *Jaikishun*[2] cannot obviously have any application because in that case no consideration for the mortgage had been paid, and therefore no interest was payable. The mortgagee was therefore liable to account for the entire income from the property during the time he was in possession. The only other case relied on was that reported in *Ranganatha Pillai* v. *Paripurnam*[3]. In that case the mortgagor alleged that the debt due on a usufructuary mortgage had been repaid out of the usufruct. The learned Judges thought it desirable that an account should be taken to find if that was true and if on accounts being taken it be found that the whole of the debt had not been paid, a decree should be passed for payment of whatever might be found due to the mortgagee. It was further alleged by the plaintiff-mortgagor therein that the amount due under the mortgage was Rs. 400, and subsequently, two years later, an amount of Rs. 300 was paid to the mortgagee. Dealing with this question on the footing that two years subsequent to the mortgage a sum of Rs. 300 was paid, the learned Judges say:

> "If a portion of this sum is appropriated towards the principal amount of the debt, then the position is that out of the total amount of Rs. 200 the plaintiff paid and the first defendant received a certain amount. It is not equitable that in those circumstances the first defendant should be entitled to appropriate the whole of the income towards the interest due on the balance of the principal due. Ex. II (the mortgage) does not fix the rate of interest to be paid for the amount of the usufructuary mortgage. The proper course, therefore, would be to appropriate a portion of the rent proportionate to the balance of principal remaining unpaid towards the interest and to hold the first defendant accountable for the balance."

It is quite clear that the learned Judges did not purport to decide the case on any question of principle but were trying to work out the equities between the parties in the best manner possible. The plaintiff in that case was the original mortgagor himself. What the learned Judges actually decided was not that the remaining amount after giving credit to a proportionate amount towards interest should go in discharge of the principal as if that was the only legal consequence. On the other hand what they say is that it is equitable that the mortgagee should account for the surplus. No authority, statutory or of decided cases, is cited and there is no discussion of the point now in issue in the present appeal.

We, however, do not think it necessary to finally decide the right of a mortgagor himself in such a case. It may be that the equitable principle applied in *Ranganatha Pillai* v. *Paripurnam*[3] may have to be applied and it may be possible to support the claim of the mortgagor as a claim by way of compensation or damages, or it might be that the mortgagee, in such cases, stands in the position of a trustee in respect of the surplus. In any event, we are clearly of opinion that such rights of the

1. (1886) 7 A.W.N. 265.
2. A.I.R. 1941 Pat. 452.
3. (1912) 16 I.C. 217.

mortgagor will not pass to a purchaser of the mortgaged property at a sale in execution of the decree obtained against the mortgagor. The plaintiff is such a purchaser and therefore will not be entitled to demand an account from the mortgagee of the rents and profits of the land.

Mr. Govindarajachari's next contention is that the third defendant is not entitled to claim the cost of the alleged improvements to be paid to him before redemption is decreed to the plaintiff. We consider that this contention is well-founded. The statutory provisions with regard to improvements to mortgaged property are contained in section 63-A (1) of the Transfer of Property Act, which runs as follows:

"Where mortgaged property in possession of the mortgagee has, during the continuance of mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.'

Prima facie, the mortgagor will be entitled to the improvements made by the mortgagee unless there is a contract to the contrary which presumably means a contract that the improvements shall belong to the mortgagee. The mortgagor will not be liable to pay the costs of the improvements except in cases provided for in sub-section (2). It has not been suggested before us that the improvements effected to the property in this case fall within sub-section (2) of section 63-A. The only question therefore is whether there is a contract to the contrary which entitles the mortgagee to be reimbursed in the expenses incurred by him in making the improvements. No doubt section 63-A (1) does not speak of a contract to the contrary under which the mortgagor can be compelled to pay the mortgagee the costs of the improvements. But if there is a contract under which the mortgagor will not be entitled to the improvements, it may be reasonably inferred that if the improvements are such that they cannot be severed from the land and taken away by the mortgagee, the mortgagor must be held liable to pay the costs of such improvements, as he will have the benefit of them. The learned Advocate-General sought to rely on the terms of the mortgage deed, Ex. D-1, to support his contention that there is a contract to the contrary within the meaning of section 63-A (1). The material portion of the mortgage deed for this question is in paragraph 4. It is translated as follows by Court:

"It is also settled that you should take care of the Kuzlikkoors (fruit trees) and chamayams (constructions) now existing in the properties without allowing them to be destroyed, that you should keep the water channel running from the Walayar river through the properties always in a state of repair, and that only the surplus water, after utilising as much as is necessary for the nilams (rice fields) now existing in the properties, and such, if any, as may be made therein in future, shall be given to the neighbouring cultivators."

The learned Advocate-General suggested that the words "Kuzlikkoors" and "chamayams," mean improvements including reclamation, relying upon the evidence of D. W. 1. Even assuming that this is the correct translation of those words, it is impossible to read into the paragraph any contract that the improvements that may be made by the mortgagee should be paid for by the mortgagor at the time of redemption. On the other hand, we read that paragraph only as providing that the mortgagee should preserve the trees and the constructions then in existence on the properties and that the mortgagee should keep the water channel already existing in a state of repair. It is more a sort of provision against waste by the mortgagee. It is impossible to read into it, firstly, that the mortgagee was permitted to effect large improvements by way of digging channels and converting dry fields into wet and reclaiming uncultivable land; and secondly, that the mortgagor should be liable to pay the cost of such improvements.

The learned Advocate-General next argued that "a contract to the contrary" should be implied in the circumstances, namely that the mortgage comprised properties situated both in Coimbatore and in Malabar and that a usufructuary mortgage like the present in Malabar would carry with it, as a customary incident (now also statutory), the mortgagee's right to effect and claim the cost of improvements. He was however unable to cite any authority in support of his contention. The deed is no doubt in Malayalam, presumably because the mortgagors were

Malayalees. But no inference can be drawn from the language in which a deed is written. The deed is called a "Kaivasampanayadharam," which we take it only means "a deed of possessory mortgage." It is very unsafe to infer any implied terms by reason of the fact that the properties are situated in two areas governed by different rules of law. It might well be argued that the parties intended that the law obtaining in Coimbatore should also be applied to the properties in Malabar in the same way as it is now contended for the mortgagee that the law governing tenures in Malabar should be applied to property in Coimbatore.

Mr. Govindarajachari attacks the finding of the learned Subordinate Judge on the factum of the execution of the improvements and the finding as to their value. It may be mentioned that the third defendant produced certain account books in proof of the expenses which he incurred for the improvements but the learned Subordinate Judge was not prepared to believe them. We have only got the oral evidence on behalf of the third defendant in support of his claim. We think that in a case where a mortgagee seeks to make the mortgagor liable for a large amount as cost of improvements, it is the duty of the mortgagee to establish by indubitable evidence the fact of the execution of such improvements and the actual expenses incurred by him for effecting them. The third defendant has failed to do that in this case. So far as the claim for reclamation is concerned, it is not clear exactly what lands were reclaimed after the execution of the mortgage and at what cost. If it were necessary to find, we have no hesitation in finding that the third defendant has not established what improvements were effected by him and the expenses which he incurred for effecting them. We therefore hold that the third defendant is not entitled to any amount on this account.

In the result there will be a preliminary decree in favour of the plaintiff for redemption of the suit properties on deposit by him into Court of Rs. 4,750. Time for payment three months from the date of this decree.

The appeal is allowed to this extent. The parties (appellant and third respondent) will pay and receive proportionate costs.

The memorandum of objections is dismissed with costs.

K.S. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Sri Jami Veerabhadraswamy .. *Accused.**

Madras Local Boards Act (XIV of 1920), *sections* 227-A *and* 237—*Criminal Procedure Code (V of* 1898), *section* 197—*Prosecution of the President of a Panchayat Board for misappropriation of war fund collections—War fund collection—Not an official duty—Previous sanction of the Provincial Government not necessary.*

The collection of subscriptions for the war fund cannot be deemed to be an official duty which had to be performed by the President of the Panchayat Board as such and it cannot be held that, after the war fund subscriptions have been collected and subsequently misappropriated by the President of the Panchayat Board, the misappropriation was while acting or purporting to act in the discharge of his official duty. In that view, although powers of removal of the Presidents of Panchayat Boards have been delegated to the Inspector of Municipal Councils and the specific power of sanctioning prosecutions vested in the Provincial Government under section 227-A has been reserved under section 237 of the Madras Local Boards Act for the Provincial Government, section 227-A is not applicable to the facts of this case. It follows that the previous sanction of the Provincial Government is not necessary for the prosecution of the President of the Panchayat Board.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the Additional District Magistrate of Vizagapatam in his letter dated 30th March, 1946.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

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* Crl.R.C. No. 401 of 1946. 26th July, 1946.
(Case Referred No. 13 of 1946).

The Court made the following

ORDER.—This is a reference by the Additional District Magistrate of Vizagapatam made under section 438 (1) of the Code of Criminal Procedure in the following circumstances.

The President of the Panchayat Board, Narasannapeta, was charged by the police for having committed criminal breach of trust in respect of certain moneys collected as subscriptions to the War Fund from the employees of the Panchayat Board and from contractors. A preliminary objection was taken on behalf of the accused to the maintainability of the prosecution on the ground that there was no sanction by the Provincial Government as required under section 197 of the Code of Criminal Procedure. The Additional First Class Magistrate, Chicacole, to whom the case had been transferred from the file of the Sub-Divisional Magistrate, Chicacole, where it was first filed, made an order ruling that the question whether the alleged criminal breach of trust was committed while discharging the official duties as such could only be gone into after evidence was recorded. It is against this order that the Additional District Magistrate has submitted this reference and his view is that the provisions of section 227-A of the Madras Local Boards Act would stand in the way of the prosecution in the absence of the previous sanction of the Provincial Government. It is pointed out by him that the alleged acts were committed by the accused when he disbursed the salaries of the employees and when he paid the contractors *qua* President of the Panchayat Board. Although powers of removal of the Presidents of Panchayat Boards have been delegated to the Inspector of Municipal Councils and Local Boards, the specific power of sanctioning prosecutions vested in the Provincial Government under section 227-A has been reserved under section 233 of the Madras Local Boards Act for the Provincial Government. So far as the learned Additional District Magistrate's view is correct; but even under section 227-A it is necessary that the act attributed to the president should have been done or purported to have been done in the discharge of an official duty. The collection of subscriptions for the war fund cannot be deemed to be an official duty which had to be performed by the President of the Panchayat Board as such and it cannot be held that, after the war fund subscriptions had been collected—presumably by consent of the respective subscribers—and subsequently misappropriated, the misappropriation was while acting or purporting to act in the discharge of his official duty. In any view of the matter it is clear that section 227-A of the Local Boards Act is not applicable to the facts of this case.

It follows, therefore, that the previous sanction of the Provincial Government is not necessary for the prosecution of the President of the Panchayat Board, Narasannapeta, in the case under reference.

The reference is rejected and the records are returned.

V.P.S. *Reference rejected.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

Estate of late Rm. Ar. Ar. Rm. Arunachalam Chettiar, through Receivers Messrs. V. Ramaswami Aiyangar and another .. *Respondents.*

Income tax Act (XI of 1922), section 4 (1) (b) (iii), Third Proviso—Scope and effect of clause (iii) of section 4 (i) (b)—Third proviso, if controls clause (iii)—Liability of the exempted income to tax when brought into British India in a subsequent year.

The assessees' income from the Rangoon business for the year of account, 1940-41, was returned at Rs. 42,051. The remittances from Rangoon during that year far exceeded this sum. They fell

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* Case Referred No. 18 of 1945. 16th August, 1946.

under three categories (1) remittances out of the income of the two previous years amounting to Rs. 42,051 ; (2) remittances out of unassessed profits of former years amounting to Rs. 3,459 ; (3) remittances out of assessed profits out of older years and out of capital amounting to Rs. 1,80,469. On a contention that the sum of Rs. 3,459, representing remittances out of unassessed profits of former years was not taxable because it represented income in respect of which there was an exemption by reason of the third proviso to section 4 of the Income-tax Act,

Held, that the contention ignores the direct provisions of section 4 (1) (*b*) (*iii*) of the Act. That clause says in unambiguous language that if income which has accrued outside British India before the year of account is brought into British India in that year, it is subject to the tax. This clause is not controlled by the third proviso and there is nothing in it which detracts from the effects of that clause. The proviso only means that if the amount of foreign income of the year of account exceeds the amount of foreign income brought into British India in that year, the assessee shall not pay tax on his foreign income not brought into British India, if such income does not exceed Rs. 4,500. If such income exceeds Rs. 4,500 the excess is taxable. It does not say that when the exempted income is brought into British India in a subsequent year it shall not be taxable. Hence the remittance in question was liable to tax.

Case referred to the High Court by the Income-tax Appellate Tribunal, Madras Bench, under section 66 (1) of the Income-tax Act, 1922 as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R.A. No. 25 Madras of 1944-45 on its file for decision on the following question of law, *viz.* :

" Whether in the circumstances of the case the sum of Rs. 3,459 was rightly assessed for the assessment year 1941-42 ?"

C. S. Rama Rao Sahib for Applicant.

A. C. Sampath Aiyangar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This is a reference made at the instance of the Commissioner of Income-tax by the Income-tax Appellate Tribunal, Madras branch, under section 66 (1) of the Income-tax Act. The assessees are the receivers of the estate of a deceased Nattukottai Chettiar named Rm. Ar. Ar. Rm. Arunachalam Chettiar. Before his death the deceased had carried on a money-lending business in Rangoon and after his death it was continued by the receivers of his estate. The income from the Rangoon business for the year of account, 1940-41, was returned at Rs. 42,051. The remittances from Rangoon during that year far exceeded this sum. The Income-tax Officer placed the remittances into three categories. The first category consisted of remittances out of the income of the two previous years. The amount was Rs. 42,051. The second category represented remittances out of unassessed profits of former years. The amount here was Rs. 3,459. The third category represented the remittances out of assessed profits of older years and out of capital, the amount being Rs. 1,80,469. The case is only concerned with the Rs. 3,459 which was remitted in the year of account out of unassessed profits of former years.

The Income-tax Appellate Tribunal held that this was not taxable because it represented income in respect of which there was an exemption by reason of the third proviso to section 4 of the Act. The Commissioner asked the Tribunal to make the reference because he was of the opinion that the Tribunal had not appreciated the real effect of the proviso. At his request the Tribunal has referred the following question for the decision of this Court :

" Whether in the circumstances of the case the sum of Rs. 3,459 was rightly assessed for the assessment year 1941-42 ? "

Section 4 (1) (*b*) says that subject to the provisions of the Act, the total income of any previous year of a person includes all income, profits and gains from whatever source derived which if the person is resident in British India during the year (*i*) accrue or arise or are deemed to accrue or arise to him *in* British India during the year, or, (*ii*) accrue or arise to him *without* British India during the year, or (*iii*) having accrued or arisen to him *without* British India, before the beginning of the year and after the 1st April, 1933, are brought into or received in British India by him during the year. Therefore section (4) (*i*) (*b*) deals with income which has arisen in British India, income which has arisen outside British India and income made in previous years which has been brought into British India during the year

of account. There are three provisos to section 4, but we are only concerned with the third. It reads as follows :

"Provided further that if in any year the amount of income accruing or arising without British India exceeds the amount brought into British India in that year, there shall not be included in the assessment of the income of that year so much of such excess as does not exceed four thousand five hundred rupees."

The draftsman might have expressed the intention of the Legislature in more simple terms, but what it means is this. If the amount of foreign income of the year of account exceeds the amount of foreign income brought into British India in that year, the assessee shall not pay tax on his foreign income *not brought into British India*, if such income does not exceed Rs. 4,500. If such income exceeds Rs. 4,500 the excess is taxable.

The case for the assessee is that if the amount remitted out of the untaxed profits of former years is less than Rs. 4,500 it is not subject to taxation at all because the concession given in the third proviso having applied must be deemed to continue to apply. The Income-tax Appellate Tribunal accepted this view, but with great respect we consider that it ignores the direct provisions of section 4 (1) (*b*) (*iii*). That clause says in unambiguous language that if income which has accrued outside British India before the year of account is brought into British India in that year, it is subject to the tax. There is nothing in the third proviso which detracts from the effects of clause (*iii*). The proviso only says that in certain circumstances the assessee shall receive exemption from taxation in respect of foreign income upto and not exceeding Rs. 4,500 in a particular year, but it does not say that when the exempted income is brought into British India in a subsequent year, it shall not be taxable. The scheme of the Act is to tax all income made in British India and all income made abroad which is brought into British India, except, of course, income which is specifically exempted.

We hold that section 4 (1) (*b*) (*iii*) is not controlled by the third proviso, which means that the Income-tax authorities rightly assessed the assessees in respect of Rs. 3,459 brought into British India in the year of account.

As the question referred has been answered in favour of the Commissioner of Income-tax the respondent must pay the costs Rs. 250.

V.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Abdul Rahim and others .. *Petitioners.**

Madras Gaming Act (III of 1930), sections 3 and 4 (2)—Betting on horse racing in a public street—If not an offence—Backed horse not running—If affects liability for the offence.

As gaming is defined in section 3 of the Madras Gaming Act as including betting on a horse race except when such betting takes place in a place within the race enclosure, it follows that betting taking place anywhere outside the race enclosure whether in a public street or in any other place would be an offence within the meaning of section 4 (2) of the Act.

The fact that a particular horse which was backed did not actually run or was not scheduled to run would make no difference so far as the liability under the Act is concerned, for to hold otherwise would be a negation of the fundamental purpose and principle of the Act, namely, to save the ordinary race-going public from the evil effects of betting on horse races.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgments of the Court of the Sub-Divisional First Class Magistrate, Saidapet, in C.A. Nos. 11 and 10 of 1946 respectively (C.C. Nos. 4563 and 4564 of 1945 and 4557 to 4560 of 1945, Stationary Sub-Magistrate, Saidapet).

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* Cr. R. C. Nos. 805 and 806 of 1946. (Cr. R. P. Nos. 773 and 774 of 1946). 19th September, 1946.

M. G. Rajagopalan for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—Two technical objections are raised against the convictions of the petitioners in these two cases which are dealt with together as the questions arising in them are common. The first is that under section 4 (2) of the Madras Gaming Act there is no reference to public street as in section 12, and it is from that circumstance argued that gaming in a public street is not an offence under the Gaming Act. Gaming is defined in section 3 as including betting on a horse race except when such betting takes place in a place within the race enclosure. That amounts to saying that betting taking place anywhere outside the race enclosure whether in a public street or in any other place is an offence within the meaning of section 4 (2) of the Madras Gaming Act, 1930. The second objection is that some of the horses which were backed by the petitioners did not actually run on that day and were not even scheduled to run. I am of opinion that this would not make any difference so far as the liability under the Act is concerned. What is prohibited is wagering or betting on a horse race. The fact that a particular horse which was backed did not actually run or was not scheduled to run would make no difference. The underlying purpose and policy of the Madras Gaming Act is to save the ordinary race-going public from the evil effects of betting on horse races, and it would be a negation of the fundamental principle of the Act to hold that betting on horses which did not actually run in the race or on horses which were not scheduled to run on the particular date would not amount to an offence.

Both the objections fail and the petitions are dismissed.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

P. Srinivasa Rao .. *Petitioner.**

Presidency Towns Insolvency Act (III of 1909), section 103 (b) (ii)—Concealment—What constitutes—Adjudication and allocation—Subsequent earnings of insolvent under contract of service—Failure to notify Official Assignee of such contract—Not a concealment within the meaning of the statute—Rights of the insolvent in after-acquired property.

To constitute concealment within the meaning of section 103 (b) (ii) of the Presidency Towns Insolvency Act there must be some act on the part of the insolvent whereby he can be shown to have wilfully kept some property away from the notice or view of Official Assignee. If there was a duty on his part to disclose or if there was a call on him to disclose and he did not conform to it or gave incorrect particulars that would be a case of concealment within the rule.

Where after adjudication and an allocation the insolvent entered into a contract of service with a third party on a fixed salary and a share in the profits and was prosecuted and convicted under section 103 (b) (ii) of the Presidency Towns Insolvency Act for having failed to bring to the notice the Official Assignee this contract of service, in revision,

Held, that as there was neither a positive duty cast on the insolvent under the statute to notify to the Official Assignee the fact of his having entered into this contract of service and the terms of remuneration nor was there a call on him by the Official Assignee to furnish such details which he failed to conform to, it cannot be held that there has been any such concealment on the part of the insolvent as contemplated by the rule and the conviction cannot be upheld. Moreover, although property belonging to the insolvent at the commencement of the insolvency vests in the Official Assignee forthwith, after-acquired properties do not vest in him unless he chose to intervene and in this case he had not done so.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Chief Presidency Magistrate, Egmore, Madras, dated 26th March, 1946, in C. C. No. 3209 of 1945.

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* Cr. R. C. No. 331 of 1946. 23rd August, 1946.
(Cr. R. P. No. 320 of 1946).

T. M. Kasturi for Petitioner.

The Crown Prosecutor *P. Chandra Reddi* for the Crown.

The Court made the following

ORDER.—This case can be disposed of on two short grounds. The petitioner has been convicted under section 103 (*b*) (ii) of the Presidency Towns Insolvency Act and sentenced to simple imprisonment for two months. That section enacts that any person adjudged insolvent who with fraudulent intent to diminish the sum to be divided amongst his creditors has concealed any part of his property of what kind soever shall be punishable with imprisonment for a term which may extend to two years. The petitioner was adjudged insolvent in 1932. He was then running a school called the Sri Ram Motor School. An allocation of Rs. 10 was fixed to be paid by him to the Official Assignee and it is admitted that he has been regularly paying the allocation. The Sri Ram Motor School was sold away with its good will by the petitioner and the proceeds of its sale were duly handed over by him to the Official Assignee. The petitioner appears to be a skilled technician. He seems to have devised a good gas plant and obtained a patent therefor. He handed over the patent also to the Official Assignee. He started a business of manufacturing producer gas plants in partnership with one Cowasji Patel. Subsequently that business was taken over by P. W. 3. P. W. 3 in his evidence admits that he was, and still continues to be, the proprietor of that business and the petitioner was only a servant under him. The basis upon which the learned Chief Presidency Magistrate has proceeded, namely, that he was a partner, is therefore incorrect. The terms of remuneration under the service contract were that the petitioner should be paid Rs. 150 per mensem and 50 per cent. of the net profits. It is not necessary to make a distinction between the two and call one salary and the other a partner's share in the profits as it is clear from the evidence of P. W. 3 that the entire amount payable to him was salary though the mode of payment was fixed in the shape of a monthly cash payment and a profit percentage. It would appear that during the material period large sums of money amounting to some Rs. 11,000 were paid to or drawn by the petitioner. The account Ex. E has been produced in proof of that statement. Mr. Kasturi tried to argue that the genuineness of Ex. E was not established; but that contention is not open to him in view of the testimony of D. W. 2 who was put in by the petitioner himself. He has definitely proved Ex. E and the relevant entries on pages 401 to 404. But this does not help the prosecution very much. There are several entries there which show that the amounts were drawn for purposes connected with the business. Although a large number of entries are shown as paid in cash and they aggregate as pointed out by the learned Magistrate to about Rs. 7,000, it is not clear from the evidence as to how much of that actually represents payment made to the petitioner towards his remuneration and how much of it was payment for the expenses of the business. The only inference in the circumstances can be one in favour of the petitioner, namely, that the petitioner did not draw anything over and above the sanctioned scale of remuneration. The question then is whether having drawn remuneration according to the contract scale it was the duty of the petitioner to bring to the notice of the Official Assignee the fact that he was getting under this contract from P. W. 3, the sum of Rs. 150 per mensem and the share in the profits of the business. I have been taken through the various provisions in the Presidency Towns Insolvency Act and looking at sections 24 and 33 which lay down the duties that are attributed to an insolvent, it is nowhere laid down that the insolvent should in such circumstances report to the Official Assignee the remuneration that he was getting from his new employer. It was argued by the learned Crown Prosecutor adverting to sections 17 and 52 of the Act that the after-acquired income over and above what is required for the maintenance of the insolvent and his family becomes property within the meaning of those sections and that it vests in the Official Assignee. There is no dispute about that proposition. But the principle is well-settled that although property belonging to the insolvent at the commencement of the insolvency vests in the Official Assignee forthwith, after-acquired properties do not vest in him unless

he chooses to intervene. When an allocation has been made it cannot be disputed that the excess over that allocation in the personal earnings of the insolvent belongs to him and he has an unfettered right of disposal over it unless it is a case where the Official Assignee considers that there is a considerably wide margin which can be taken over for distribution amongst the creditors, in which case he has to move the Insolvency Court and obtain its orders. Such a thing has not been done in this case.

The petitioner has been convicted for having " concealed " part of his property with a fraudulent intention. As I have pointed out, there is no positive duty cast upon him under the statute to notify to the Official Assignee the fact of his having entered into this contract of service and the terms of remuneration. He was not called upon by the Official Assignee to furnish details or particulars as to the amounts that he received in connection with this business. To constitute concealment within the meaning of section 103 (*b*) (ii) there must be some act on the part of the petitioner whereby he can be shown to have wilfully kept some property away from the notice or view of the Official Assignee. If there was a duty on his part to disclose or if there was a call on him to disclose and he did not conform to it or gave incorrect particulars, that would be a case of concealment within the meaning of the rule. In the present case I find it difficult to hold that there has been any such concealment on the part of the petitioner and it is not therefore necessary to consider the further ingredients of the offence as to whether the requisite fraudulent intent was present. In this view the conviction of the petitioner cannot be upheld. The petition is allowed and the conviction is set aside.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Syed Ahmed and another .. *Appellant**

v.

Julaiha Bivi and others .. *Respondents.*

Mussalman Wakf Validating Act (VI of 1913), sections 3 and 4—Combined effect of—Valid object of wakf—Test—Implication of reservation of ultimate benefit in favour of the poor or other unfailing charitable object—Inference—Permissibility—Wakfnama—Validity—Construction—Charitable purpose—What would amount to—Recital of Maulud Shariff in the name of Nabinayakam—Distribution of food on Prophet's birthday.

The combined effect of the provisions of sections 3 and 4 of the Mussalman Wakf Validating Act is that a perpetual settlement of property for the maintenance and support of a Mahomedan settlor's family, children or descendants is perfectly valid, provided that the ultimate benefit of the disposition is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose although such reservation is to take effect after the extinction of the family, children or descendants.

As the Act has made it perfectly clear that in the context of Mussalman *wakfs* religious, pious, or charitable purposes refer only to purposes "recognised" as such by Mahomedan Law, it cannot be said that the test of a valid object of a *wakf* is benefit to the public as in the English Law of charitable trusts.

Unless there are indications to the contrary, the use of the term "*wakf*" by a settlor may by itself be taken to imply an ultimate dedication for the poor or for other unfailing charitable object and there is nothing in the Act to exclude such implication. When the settlor creates a "*wakf*" partly for the maintenance and support of his family and children and partly for a specified charitable purpose such as for instance the support of a mosque, an ultimate reversion of the fund bestowed on the family could well be inferred in favour of such charity; for where a settlor has indicated a preference for a specific religious or charitable purpose of a permanent character by making a concurrent gift for it or otherwise, the condition of perpetuity can be fulfilled by implying an ultimate reservation in favour of such object, and it would not be necessary in such a case to bring in the poor. The proviso to section 3 of the Act accordingly contemplates the reservation of ultimate benefit being implied either in favour of the poor or for any other purposes recognised by the Mussalman law as religious, pious or charitable purpose of a permanent character. On a question of implied intention the Court has often to find out not what the person concerned actually intended, but what he may be justly presumed to have intended in regard to matters about which he did not think at all.

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* Appeal No. 183 of 1940. 15th August, 1946.

A wakfnama executed by a Hanafi Mussalman in Tamil called "wakf charity deed" had five schedules attached to it, of which schedule D specified the "particulars of charity to be conducted" and the remaining schedules described the properties, lands and houses to which it related. It recited that those properties had been set apart for "wakf charity" "following the practice of our religion and in accordance with Act VI of 1913," and provided that out of the income derived from the properties, after deducting the kist, taxes and other charges, the charities referred to in schedule D should be conducted at a cost of Rs. 160 per annum. There was provision for the wakif's sons to manage the properties as trustees, for payment of the income of the lands specified in one of the schedules to his four daughters and their heirs, and for his wife's enjoying certain items of property during her lifetime. These latter properties were after her lifetime "to be added to the charity referred to in schedule D." There was also a provision for seeking the help of Court if the trustees refused to manage or resigned and in litigations in which the charity was concerned, the Advocate-General was to be added or consulted. The charities specified in schedule D were that in a building referred to in one of the schedules, "one Mavulthu and one Hattam in the name of Nabinayakam, one Hattam in the name of Shaful Hameed Andawar, one Hattam in the name of Meera Akamad Shakathari Avergal and one Hattam in my name after my death shall be recited on the full moon day of every month, *i.e.*, on the 14th day of the lunar month, at a cost of Rs. 5. On the 10th of Rabilavil of each year Mavulth shall be recited in the name of Nabinayakam in the Kattubapalli at Vijayapuram and food distributed at a cost of Rs. 100." On a question whether the objects of the wakf were valid in view of the fact that though the income of the properties was Rs. 1,500 the charities were to be conducted at a cost of only Rs. 160 and whether the requirements of the proviso to section 3 of the Mussalman Wakf Validating Act were satisfied and the wakf protected under the Act,

Held, that the wakfnama was under the Act a valid charitable disposition notwithstanding the provisions contained therein for the maintenance and support of the wakif's family and descendants. The recital of Maullud Shariff in the name of Nabinayakam and distribution of food on the birth day of the Prophet is certainly a purpose that would be denominated charitable even in the English sense. Therefore the objects specified in schedule D of the deed must be held to be religious, pious or charitable under the Mahomedan Law. The terms of the deed clearly indicated that it was the settlor's intention that the entire usufruct should ultimately go to the specified charities on the extinction of the line of descendants.

Case-law reviewed.

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram, dated 18th April, 1940, and passed in O. S. No. 13 of 1939.

M. S. Venkatarama Aiyar and *V. Ramachandran* for Appellant.

B. Pocker, *M. A. Jamal Hussain*, *K. Venguswami Aiyar*, *K. T. M. Ahmad Ibrahim*, *R. Viswanathan*, *T. R. Srinivasan* and *S. Swaminathan* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—The only question raised in this appeal relates to the validity of a *wakfnama* executed by one Mahomed Hussain Rowther, a Hanafi Mussalman, since deceased. His widow, the first respondent herein, sued her co-heirs for partition of his estate and for accounts, impugning the validity of the *wakf*, and the Subordinate Judge of Mayavaram who tried the suit has upheld her claim, finding that the *wakf* was not valid either under the Mahomedan Law as it was understood before the Mussalman Wakf Validating Act (No. VI of 1913) (hereinafter referred to as the Act) or under the Act. From that decree the first defendant who is one of the trustees of the wakf has brought this appeal.

The *wakfnama* (Ex. I) is in Tamil and is called "wakf charity deed." It has five schedules A to E attached to it, of which schedule D specifies the "particulars of charity to be conducted," and the remaining schedules describe the properties, lands, and houses, to which it relates. It recites that those properties had been set apart for "wakf charity" "following the practice of our religion and in accordance with Act VI of 1913," and provides that, out of the income derived from the properties at the end of each fasli, the kist, taxes and other charges should be deducted, and the charities referred to in schedule D should be conducted at a cost of Rs. 160 per annum. The *wakf's* three sons (defendants 1 to 3 in the suit) should "as trustees manage the remaining income after deducting the cost of charity." The income from the lands specified in schedule C should, after deducting expenses, be paid to his four daughters in equal shares during their lifetime and thereafter proportionately to their heirs hereditarily. His wife (plaintiff) should enjoy the shop, item 2 in schedule A, and the lands referred to in schedule E during her lifetime and thereafter these properties

"shall be added to the charity referred to in schedule D."

His descendants should hereditarily conduct the said charity and

"take only the remaining incomes after dividing them at the end of each fasli".

Then follow certain provisions for the devolution of the right to the surplus income and the right of management of the properties, which are not to be alienated or made liable for the debts of any of the descendants. Proper vouchers and accounts are to be maintained in respect of the income and expenditure of "this charity estate," and if any trustee or all the trustees refuse to manage or resign the Civil Court should appoint

"the Court of Wards or the necessary trustees in the vacant places till another trustee or trustees are available as aforesaid and see that the charity is administered".

"Should there be any litigation in Court when any injury or loss, etc., is likely to be caused to this deed or a portion thereof or the said charity, the property being charity property, the plaintiff or defendant shall add the Advocate-General as a party or take his opinion and conduct the said suit."

The charities specified in schedule D are as follows :—

"In the building constructed by me in the name of T. Muhaitheen Andavar Avergal on the punja land bearing Resurvey No. 22/8 in the Anaikovil village, Valkudi vattam, Nannilam taluk and referred to in the B schedule, one Mavulthu and one Hattam, one Hattam in the name of Nabinayakam, one Hattam in the name of Shagul Hameed Andavar, one Hattam in the name of Meera Akamad Shakathari Avergal, and one Hattam in my name after my death shall be recited on the full-moon day of every month, *i.e.*, on the 14th day of the lunar month, at a cost of Rs. 5.

On the 10th of Rabilavil of each year Mavulth shall be recited in the name of Nabinayakam in the Kattubapalli at Vijayapuram and food distributed, at a cost of Rs. 100."

The learned Subordinate Judge has found that the annual net income of the lands specified in plaint schedule A-1 (schedule B of the deed) alone is about Rs. 1,500 and that the provision for the charities costing only Rs. 160 per annum is an illusory trust and cannot be upheld as a valid *wakf* under the Muhammadan law as expounded by the decisions of the Privy Council before the passing of the Mussalman Wakf Validating Act, 1913. (Vide *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*[1], *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri*[2] and *Mujib-un-nissa* v. *Abdur Rahim*[3].) This conclusion has not been seriously challenged before us by Mr. Venkatarama Aiyar on behalf of the appellant. He contended, however, that, under the Act, the *wakfnama* was a valid charitable disposition notwithstanding the provisions contained therein for the maintenance and support of the *wakif's* family and descendants. The question accordingly arises whether the deed, Ex. I fulfils the requirements of the Act.

The history of that legislation and the controversy which it was designed to set at rest are well-known. That controversy centred round the question as to how far beneficial interests in property settled as *wakf* could be reserved in favour of the settlor or his family and descendants. Broadly speaking, the decisions revealed two divergent trends of opinion traceable fundamentally to differences of outlook and approach. One line of cases, largely influenced by English ideas of charity and charitable uses and the English law of perpetuities, held that if the gift was in substance to the settlor's own family and not to charitable purposes the *wakf* was illusory and void. While recognising that Mahomedan law ought to govern a Muhammadan disposition of property and that, according to that law, provisions for the settlor's family might be consistent with the creation of a valid *wakf*, those decisions required that the dedication must in substance be for the benefit of others and not a mere colourable device for the aggrandisement of one's own family. They refused to act upon the spiritual precepts commending perpetual settlements on one's own children and descendants as pious acts of great religious merit. This view was favoured by the majority of the Full Bench in *Bikani Mia* v. *Shuklal Poddar*[4] and was upheld by their Lordships of the Privy Council

1. (1889) L.R. 17 I.A. 28 : I.L.R. 17 Cal. 498 (P.C.).
2. (1894) L.R. 22 I.A. 76 : I.L.R. 22 Cal. 619 (P.C.).
3. (1900) L.R. 11 M.L.J. 58 : 28 I.A. 15 : I.L.R. 23 All. 233 (P.C.).
4. (1892) I.L.R. 20 Cal. 116 (F.B.).

in *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri*[1], affirming the decision in *Rasamaya Dhur Chowdhri* v. *Abul Fata Mahomed Ishak*[2]. The other view, for which the dissenting judgment of Ameer Ali, J., in *Bikani Mia* v. *Shuklal Poddar*[3], may well be regarded as the *locus classicus*, insisted that the question must be approached purely from the point of view of Islam in which law and religion are closely connected, and that, in determining what are valid objects of *wakfs* guidance must be sought from scriptural ordinances and works of Mahomedan jurists. The learned Judge held, after an elaborate examination of recognised Islamic authorities, that support of one's own family and descendants was an approved form of charity, and a perpetual settlement of property for such purpose and for the ultimate benefit of the poor or some other pious, religious or charitable object of a permanent nature was valid, although such ultimate trust might not be express but might be implied. He concluded his judgment by voicing the protest of his community in the following words :

> "To hold that a wakf the benefaction of which is bestowed wholly or in part on the *wakif's* family and his descendants is invalid would have the effect, in my opinion, of sweeping away an important branch of Mussalman law with which are associated and intermixed the dearest religious interests of the people." (P. 176.)

The protest eventually found an echo in the Council Chamber, and in response to the demand of the community the Legislature passed the Act superseding the Privy Council decisions referred to above and declaring the law more conformably to the views and sentiments expressed in the judgment referred to above.

Turning now to the provisions of the Act, section 2 (1) defines

> "wakf" as "the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable".

Section 3 declares :—

> "It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :—
>
> (*a*) For the maintenance and support wholly or partially of his family, children or descendants, and
>
> (*b*) where the person creating a wakf is a Hanafi Mussalman also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated :
>
> Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character."
>
> "4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf."

The combined effect of these provisions is that a perpetual settlement of property for the maintenance and support of a Mahomedan settlor's family, children or descendants is perfectly valid, provided that the ultimate benefit of the disposition is expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose, although such reservation is to take effect after the extinction of the family, children or descendants.

It does not appear to have been seriously suggested in the Court below that the purposes specified in Schedule D of Ex. I are not valid objects of a *wakf*. On the other hand, the allegation in the plaint (para. 7) that

> "one of the *fatihas* to be performed is that of Muhammad Hussain himself after his death which is not a valid object of a wakf"

would seem to imply that the other objects specified are valid objects. This probably explains the absence of any clear and precise evidence as to the nature

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1. (1894) L.R. 22 I.A. 76 : I.L.R. 22 Cal. 619 (P.C.).
2. (1891) I.L.R. 18 Cal. 399.
3. (1892) I.L.R. 20 Cal. 116 (F.B.).

of these ceremonies and services and their significance and efficacy in Islam. An attempt, however, was made before us by Mr. Pocker for the respondent to show that none of them could be regarded as charitable in the sense of being for the benefit of the poor or of the public. It was broadly contended by the learned counsel that unless there was an element of public benefit or welfare no object or purpose could be regarded as charitable under the Act, and reliance was placed on the decision in *Kunhamutty* v. *Ahmad Musaliar*[1], where it was held that reciting Koran over the tomb of a private person was not a valid object of a *wakf* under the Muhammadan law. There are no doubt passages in the judgment which may appear to lend some support to the contention of Mr. Pocker, but reading the judgment as a whole we do not think that the learned Judges (Beasley, C.J. and King, J.) intended to lay down that there can be no valid dedication of property by way of *wakf* except for purposes which are recognised as charitable in English law. Refuting the argument that the Act widened the scope of the objects for which a *wakf* could be created under the Muhammadan law, they observed :

> "In our view no change in the law was brought about with regard to the purposes, namely, religious, pious or charitable. Those purposes had always previously been recognised and this is perfectly clear from the Privy Council decision *Ramanandan* v. *Vava Levvai Marakayar*[2], and other cases and it is not right to say that the words 'or charitable' really provide an alternative to 'religious and pious'."

That is to say, as we understand it, in Muhamadan Law religious and pious purposes were always recognised as charitable. The point actually decided was that reading the Koran at the tomb of dead persons was not a charitable object under Muhammadan law, a view with the correctness of which we are not here concerned. No doubt, charity in the English sense was in some cases assumed to be an essential element in the constitution of a *wakf*, a tendency deprecated by Ameer Ali, J., in the judgment referred to above. But the Act has made it perfectly clear, that, in the context of Mussalman *wakfs*, "religious, pious or charitable purposes" refer only to purposes 'recognised' as such by the Mahomedan law. We cannot therefore accede to the suggestion that the test of a valid object of a *wakf* is benefit to the public as in the English law of charitable trusts. Pious acts recognised among the Mussalmans as being for good of the soul of the settlor or his ancestors have been upheld as valid objects of a *wakf*. In the judgment already referred to Ameer Ali, J., observes thus :

> "Among the Mussalmans, it is the general practice to invoke the names of their deceased ancestors at certain religious festivals, especially the *Shah-e-barat*, commonly called the *Shubrat*, to spread flowers and light candles or *chiraghs* over the grave of the deceased, to have the Koran recited, particularly if the family is possessed of means, on the spot where he died. Herklot in his *Qanoon-i-Islam* describes the ceremonies performed at the time of *Shubrat* or *Shah-e barat*. In the month of Ramazan, on one of the nights believed to be the 'night of excellence' mentioned in the Koran, 'when the angels and the spirit descend to the earth at the command of their Lord', it is usual to offer *fatihas* for the dead ; also in Rajjab, the month of 'the Ascension'." (Page 176.)

Learned counsel referred us to the judgment of Karamat Hussain, J., in *Fakhr-ud-din Shah* v. *Kifayat-ul-lah*[3], where that learned judge expressed the opinion that though the "orthodox" *fatiha* ceremony of reading the *Al fatiha* or the beginning of the Quran for the benefit of the soul of a dead Mahomedan was a recognised religious practice, the *fatiha* ceremony in the "popular sense" of preparation of food or sweets at the death anniversary of a deceased Mahomedan which after the recital of the *fatiha* is distributed among the friends and relations of the person who spent the money over it without any regard to the poverty of the recipients was neither a religious nor a charitable purpose. As we have already observed, there is no clear evidence in the present case as to the nature of the services and ceremonies required to be performed which are admitted in the plaint to be *fatihas* (para. 6), and it is not possible to say whether they are of the "orthodox" or the "popular" variety described by the learned Judge. Apart from this, his view has not been

1. (1934) 68 M.L.J. 107 : I.L.R. 58 Mad. 204.
2. (1916) 32 M.L.J. 101 : L.R. 44 I.A. 21 : I.L.R. 40 Mad. 116 (P.C.).
3. (1910) 7 A.L.J. 1095.

generally accepted (*vide* Mulla's Mahomedan Law, 12th edition, page 155). And whatever doubt may arise as to the true character of the other purposes mentioned in schedule D of Ex. I, the purpose last mentioned, *viz*., the recital of Maullud Shariff in the name of Nabinayakam (singing verses in praise of the Prophet) in the Kattubapalli (Mosque) at Vijiapuram and distribution of food on the birthday of the Prophet is certainly one that would be denominated charitable even in the English sense. We are therefore of opinion that the objects specified in schedule D of Ex. I must be held to be religious, pious or charitable under the Muhammadan law.

It is next urged that the requirements of the proviso to section 3 are not satisfied and that the *wakf* is not protected under the Act. The proviso requires that there must be an ultimate trust, express or implied, for the poor or for any other unfailing religious, pious or charitable purpose recognised by the Muhammadan law. In the *wakfnama* before us there is an express ultimate gift to the charities in respect of the properties which are to be enjoyed by the settlor's wife (plaintiff), but there is no express reservation of the ultimate benefit of the other properties in favour of those charities on failure of his children and descendants. The question is whether such reservation can be implied from the terms of the instrument read in the light of the surrounding circumstances.

As stated already, the deed is described as a "wakf-charity deed" and recites that the author "following the practice of our religion and in accordance with Act of 1913", had "relinquished" the properties therein comprised in favour of the "wakf-charity". It is also worthy of note that the general scheme of the disposition is to endow the properties to the charities named, with a condition that, subject to their performance as directed by the settlor by his sons who are appointed "trustees", the surplus income is to be distributed among his children and their descendants from generation to generation. As pointed out by Ameer Ali, J. :

> "a man may make a *wakf* either directly constituting himself and his descendants the recipients of the benefaction with an ultimate reserve for the poor ; or may make a *wakf* in general terms or expressly in favour of the poor and reserve the usufruct for himself and his family so long as they exist. The dedication is valid in both cases".

It is no doubt a matter of form. But it seems to us that an inference of ultimate trust for the poor or for other unfailing charitable object would arise more readily where the latter form was adopted as in the present case ; for, the charge on the usufruct in favour of the family must necessarily lapse on the extinction of the family in the course of time, leaving the whole profits for the object for which the properties were originally endowed. Furthermore, the *wakfnama* Ex. I provides for the Advocate-General being added as a party to any litigation arising in regard to the properties or his opinion being taken for conducting it, and refers to the properties as "charity properties" which are to be inalienable and not answerable for the debts of the beneficiaries. These terms taken along with the provision for the augmentation of the charity fund by the plaintiff's share lapsing into it on her death indicate clearly to our minds that it was the settlor's intention that the entire usufruct should ultimately go to the specified charities on the extinction of the line of his descendants.

Our attention was called to certain decisions of the Allahabad and Calcutta High Courts holding that the Act, on its true construction, precluded any inference of an ultimate trust to charity being drawn from the mere use of the term "*wakf*" by the settlor. Although, as we have pointed out above, there is much more in the *wakfnama* before us than the mere use of the word "*wakf*" to warrant the implication of an ultimate reserve for the charities named, the line of cases has to be considered as we have relied also on the use of that expression in Ex. I in support of our conclusion.

The earliest decision on the point brought to our notice is *Irfan Ali* v. *Official Receiver, Agra*[1], where, on a difference of opinion between two other Judges, Mukerji and Banerji, JJ., it was held that the mere use of the word *wakf* could not in itself be

1. (1930) I.L.R. 52 All. 748.

regarded as connoting an implied reservation of the ultimate benefit for the poor. "The ultimate object of the *wakf* has to be implied by use of other words." The reason is best given in their own words :

> "The word 'wakf' has been used in the Act itself (section 3) and it has been given a definite meaning. The word has not been used by the Legislature as meaning a dedication for the benefit of the poor alone. It includes a dedication for religious and pious objects as well. Some authorities have been quoted before us which go to show that where the word 'wakf' has been used in a deed the ultimate benefit from the property goes to the poor on the extinction of the immediate object of the dedication. This would mean that the word 'wakf' has been used under the ordinary Mahomedan law in a restricted sense. The Legislature, however, has given it a much larger sense."

With all respect, the reasoning is unconvincing and seems to us to proceed on a somewhat imperfect appreciation of the principles of the Mahomedan law relating to *wakfs*. It is difficult to see why the use of the word in the Act itself should be taken to exclude any implication of an ultimate trust for the poor when the word is used by a settlor in his deed of endowment. It is not correct to say that under the ordinary Mahomedan law the word *wakf* is used in the restricted sense of a dedication for the benefit of the poor alone and that the Legislature has given it a much larger sense so as to include dedication for religious and pious objects as well. A reference to Mulla's Principles of Mahomedan Law (12th edition, p. 155) will show that a variety of religious and pious purposes had all along been recognised as valid objects of a *wakf* before the passing of the Act. As pointed out by Ameer Ali, J., in the judgment to which we have already referred,

> "It is unquestionable that there are many wakfs which have not the remotest connection with the poor, *e.g.*, a wakf for a mosque."

Indeed, their Lordships of the Judicial Committee observed in *Ma Mi* v. *Kallander Ammal*[1], that the definition of "*wakf*" in the Act was only a definition for the purposes of the Act and not necessarily exhaustive, thereby indicating that under the ordinary Mahomedan law, the term is used not in a narrower but in a wider sense. The reason for implying an ultimate dedication for the poor is this. An essential condition for constituting a *wakf* is that the gift must be perpetual, but where a man purports to create a "*wakf*" in favour of his family and descendants the condition of perpetuity is not fulfilled as such a class of beneficiaries must in course of time cease to exist. An ultimate trust is therefore implied in favour of the general body of the poor, who are always with us and so form a permanent object of benefaction. As Ameer Ali, J., observes :

> "When a *wakf* is created constituting the family or descendants of the *wakf* the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in *not* for the purpose of making the *wakf* charitable (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made) but simply to impart permanency to the endowment. When the wakif's descendants fail it must come to the poor. So it is an enduring benefaction." (Page 146.)

This is not, however, to say that the implication of ultimate trust should necessarily and always be made in favour of the poor. When the settlor creates a "*wakf*" partly for the maintenance and support of his family and children and partly for a specified charitable purpose such as for instance the support of a mosque, an ultimate reversion of the fund bestowed on the family could well be inferred in favour of such charity ; for, where a settlor has indicated a preference for a specific religious or charitable purpose of a permanent character by making a concurrent gift for it or otherwise, the condition of perpetuity can be fulfilled by implying an ultimate reservation in favour of such object, and it would not be necessary in such a case to bring in the poor. The proviso to section 3 accordingly contemplates the reservation of ultimate benefit being implied either in favour of the poor or for any other purposes recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character. There is, therefore, nothing in the Act to preclude an ultimate dedication to the poor or other charitable object being inferred from the use of the word "*wakf*" by a settlor in constituting a family *wakf*.

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1. (1926) 52 M.L.J. 362 : L.R. 54 I.A. 23 : I.L.R. 5 Rang. 7 (P.C.).

On the other hand the circumstances that led to the passing of the Act to which reference has been made already would seem to indicate that the Legislature has deliberately adopted the view of Abu Yusuf who propounded the doctrine of implied reservation of ultimate benefit to a perpetual object of bounty such as the poor in preference to that of Mahomed who insisted that such reservation should be express. Ameer Ali, J. (pages 172, 173) favoured the rule of Abu Yusuf which, he pointed out, was

"in accordance with the express practice and authority of Mussalman Judges and lawyers for ages."

The Bombay High Court had, however, held in *Nizamuddin Gulam* v. *Abdul Gafur valad Mainuddin*[1], that a grant in *wakf* to one's own family and descendants could not be supported where there was no express provision for the ultimate devolution of the property to any unfailing religious or charitable object, and this decision had been affirmed by the Privy Council in *Abdul Gafur* v. *Nizamuddin*[2]. Subsequently, even an express ultimate trust for a permanent charitable object was, as we have seen, held to be ineffectual to validate a family *wakf* where such trust was to take effect on the extinction of the *wakif's* line of descendants and was thus remote and "illusory." (*Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhri*[3].)

All this case-law which made considerable inroad upon the Mahomedan law as declared by authoritative Mussalman law-books like *Fatawah Alamgiri* which had accepted and followed the views of Abu Yusuf, has been superseded by the Act which now declares the rights of Muslims to make settlements by way of *wakf* in favour of their families, children and descendants. The Act recognises by defining "wakf" as a dedication for "a religious, pious or charitable purpose" (section 2) and including the maintenance and support of the *wakif's* family, children and descendants among the purposes for which a *wakf* can be created (section 3), what Ameer Ali, J., endeavoured unsuccessfully to establish in his dissenting judgment, *viz.*, that, in the eye of the Mahomedan law, provision for one's own family and descendants is a pious and charitable purpose. The Act did away with the doctrine of illusory *wakf* as applied to such settlements of property. It also dispensed with the necessity of making express mention of a permanent object of benefaction as the ultimate destination of the dedicated property. The statute has thus fundamentally changed the entire situation and outlook and brought the law in regard to the matters dealt with by it into conformity with the principles enunciated by Abu Yusuf and accepted by later Mahomedan jurists. In applying a statute with such a history, the Court ought, in our opinion, to interpret its provisions, as far as the language would allow, in harmony with those principles without reading into it restrictions which are not to be plainly found there.

The learned Judges in *Infan Ali* v. *Official Receiver, Agra*[4], say :

"It appears to us that the Legislature having passed an Act relating to the subject it would not be fruitful of any good to start a research into the previous state of the law as it existed before the Legislature added one more Act to the statute-book"

and they refer to *Ramanandi Kuar* v. *Kalavati Kuar*[5], where their Lordships of the Judicial Committee point out that the language of a statute should be examined to ascertain its proper meaning

"uninfluenced by any consideration derived from the previous state of the law."

This is true where the language of the statute is plain and admits of no doubt. The proviso to section 3 uses the expression "expressly or impliedly reserved." What does "impliedly" mean ? Is there anything clear in the proviso or elsewhere in the Act to exclude any implication of ultimate gift from the use of the word "*wakf*" by the settlor ? We are unable, as we have already stated, to discover any indication to that effect. The preamble says that "doubts" had arisen as to the validity of family *wakfs* and that the Act was passed with a view to "remove

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1. (1888) I.L.R. 13 Bom. 264.
2. (1892) L.R. 19 I.A. 170 : I.L.R. 17 Bom. 1 (P.C.).
3. (1894) L.R. 22 I.A. 76 : I.L.R. 22 Cal. 619 (P.C.).
4. (1930) I.L.R. 52 All. 748 (752).
5. (1927) 54 M.L.J. 281 : L.R. 55 I.A. 18 : I.L.R. 7 Pat. 221 at 227 (P.C.).

such doubts." What were the doubts and how were they removed? It seems to us legitimate, in interpreting such a statute, to see what was the previous state of the law in order to ascertain the true intention of the Legislature. "If any doubt arises," said Tindal, C.J., in *Sussex Peerage Case*[1]

"from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute and to have recourse to the preamble, which, according to Chief Justice Dyer (*Stowel* v. *Lord Zouch*, Plowden 359, 369) is a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress".

Applying that principle to the enactment in question it would seem that the framers of the Statute intended to uphold the validity of *wakfs* in favour of one's *aulad* (children or descendants) conformably to the views of Abu Yusuf which were favoured by preponderance of opinion among Mahomedan lawyers. According to those views, a reversion for the poor or other charitable object of a permanent character on the extinction of the dedicator's family, may be inferred from the mere use of the term "*wakf*" which in itself is taken to imply ultimate benefaction for the poor or for any other unfailing charitable purpose. (*See* Ameer Ali's Mahomedan Law, 4th edition, Vol. I, pages 239, 240.) We accordingly hold that, unless there are indications to the contrary, the use of the term *wakf* by a settlor may by itself be taken to imply an ultimate dedication for the poor or for other unfailing charitable object and that there is nothing in the Act to exclude such implication.

The two Calcutta decisions to which also reference was made, *viz.*, *Masuda-khatun Bibi* v. *Mahomed Ebrahim*[2] and *Tahiruddin Ahmad* v. *Masihuddin Ahmad*[3], approve the decision in *Irfan Ali* v. *Official Receiver, Agra*[4], and, in the former case, the learned Judges give two additional reasons in support of that view:

"If the Legislature intended that the term 'wakf' itself should be taken to imply an ultimate trust for the poor or other unfailing charitable object, nothing was easier for them than to have plainly said so."

But this reasoning is apt to evoke the comment that it was equally easy for the Legislature to exclude such implication by express enactment. Then the learned Judges say that

"to give effect to this contention would be to render the proviso nugatory, for there is hardly, if ever, a deed which does not describe itself as a deed of wakf and yet is set up as not having created a wakf."

In the first place, cases where the Court had to determine whether a grant which was not described as a deed of *wakf* constituted a *wakf* are by no means so uncommon as the learned Judges imagine. Ameer Ali, J., refers to a few such cases in his judgment (pages 150, 151), and more can be found in the books. And, further, there is no question of the proviso being rendered nugatory in the view we are inclined to take, for, howsoever the implication may arise, it would still be necessary, having regard to the previous state of the law, to have a positive enactment that an *implied* ultimate dedication for an unfailing charitable object is sufficient to validate a family-wakf.

A concurrent and immediate gift for permanent charitable objects in a *wakf* created in favour of one's own children and descendants has been held to warrant the implication of an ultimate trust for those objects on the failure of the descendants. Sulaiman, C.J., delivering the judgment of the Court in *Mt. Rudia Begum* v. *Surajmal*[5] observed thus:

"Where the *wakif* has indicated his intention that his object is to benefit his family, and also religious, pious or charitable purposes, it can be implied that there is an ultimate reservation for such purposes, particularly so when he has provided that a part of the income should be applied to such purposes during his own lifetime. If one object, namely, the maintenance of his descendants, fails, there is no reason why the other object should also fail, and no reason whatsoever why the whole income should not be devoted to the remaining object as indicated."

These observations are apt to cover the present case and we entirely agree with them.

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1. (1844) 11 Cl. & F. 85, 143: 8 E.R. 1034.
2. (1931) I.L.R. 59 Cal. 402.
3. (1933) I.L.R. 60 Cal. 901.
4. (1930) I.L.R. 52 All. 748.
5. A.I.R. 1936 All. 404.

It is said that no such implication can arise in the present case because the scale of expenditure for the performance of the charities mentioned in Schedule D has been fixed by the settlor himself and there is no reference to the poor in that schedule. It is true that the trustees are directed to conduct the charities at a cost of Rs. 160, but we do not regard the direction as fixing a permanent scale of expenditure for their performance. The provision in the deed that on the death of the settlor's wife the income of the properties enjoyed by her should go to augment the charity-fund shows that no fixed scale for all time and in all circumstances was intended. Reading the *wakfnama* as a whole we think that all that was intended was that the *wakif's* sons and their descendants should enjoy the surplus income of certain properties specified in that behalf after devoting Rs. 160 per annum to the charity. It should be noted that one of the objects mentioned in schedule D, *viz.*, feeding the poor on the birthday of the Prophet, is capable of indefinite expansion and might well absorb the entire usufruct of the properties comprised in the deed. Though the word "poor" is not used in the provision for distribution of food, there can be little doubt, having regard to the context, that the settlor intended that the poor should be the object of his benefaction.

It was next argued that the provision for the devolution of the trusteeship among the *wakif's* children and their descendants for ever, coupled with the fact that, while providing for a reversion of the properties to the charities on the death of his wife, the settlor made no such provision to take effect on the extinction of his descendants, shows that he never thought of that contingency at all, and that, therefore, no intention of ultimately benefiting the poor or other charitable object could be attributed to him. We see no force in this argument. The circumstance that the settlor did not think of the possibility of the failure of his descendants has, no doubt, been referred to in some cases as tending to negative the implication of any ultimate trust (cf. *Mt. Ruqia Begam* v. *Suraj Mal*[1]), but we think it only explains why he made no express provision for it. On a question of implied intention the Court has often to find not what the person concerned actually intended, but what he may be justly presumed to have intended in regard to matters about which he did not think at all. The principle is familiar enough in the law of contracts and has been stated perhaps nowhere better than by Lord Watson in *Dahl* v. *Nelson, Donkin & Co.*[2]:

"There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

The principle is one of construction, and is, we apprehend, applicable to the construction of grants as well as of contracts. Applying that principle to the *wakfnama* in question we have little doubt having regard to its terms and the surrounding circumstances, that if the *wakif* had thought of the possibility of the extinction of his line of descendants and provided for the ultimate destination of the properties in that event, such provision would presumably have been in favour of the charities named in schedule D.

It follows that the *wakfnama* satisfies the requirements of the proviso to section 3 of the Mussalman Wakf Validating Act, 1913, and must be upheld as valid.

The appeal is, therefore, allowed and the decree of the Court below will be modified as follows: the properties mentioned in schedules A to A-3 of the plaint shall be excluded from the scope of clause (1) directing partition and delivery of possession; the plaintiff shall, however, be entitled to an account from defendants 1 to 3 of the profits of item (2) of schedule A and of the lands mentioned in schedule A-3 from 20th July, 1936. In other respects, the decree of the lower Court is confirmed. The costs of all the parties in this Court will come out of the estate.

V.S. ——— *Appeal allowed and decree modified.*

1. A.I.R. 1936 All. 404.
2. (1881) 6 A.C. 38, 59.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE RAJAMANNAR.

Chavakula Yanadamma and another .. *Appellants**

v.

Chavakula Venkateswarlu and others .. *Respondents.*

Registration Act (XVI of 1908) as amended by Act (XXI of 1929), section 17 (2) (v)—Award of arbitrator in dispute between parties regarding interest in immoveable property—Award not operating as a conveyance but only declaring a right to demand a conveyance in future—Award, if compulsorily registrable.

The plaintiffs, mother and daughter, had a right to maintenance and the first plaintiff the mother was demanding from the first defendant, her deceased husband's undivided brother, an assignment of property in lieu of the right to maintenance. The dispute concerned the quantum of property and the terms on which it should be assigned and it was referred to arbitration. The decision of the arbitrator settled the dispute by making certain arrangements for the enjoyment of the properties and making provision for the residence of the mother and daughter and the marriage of the daughter. It concluded by reciting that the first plaintiff should take immediate possession of the lands allotted to her and that both parties should get the necessary documents executed and registered incurring the necessary expenses in equal shares. On a question whether the award was compulsorily registrable,

Held, that the decision of the arbitrator settled the dispute between the parties only as to the quantum of property and the terms of its assignment, but it did not of itself operate as a conveyance; nor could a mere declaration suffice to give title to the plaintiffs when a conveyance was obviously necessary. The most that this award, read as part of the contract between the parties, could achieve was to give the plaintiffs a right to require the first defendant to convey to them the property selected by the arbitrator. The award stood on no higher footing than an agreement to transfer in future and having regard to the terms of section 17 (2) (v) of the Registration Act, it did not require to be registered and would be admissible in evidence without registration.

Appeal against the decree of the Court of the Subordinate Judge of Tenali, dated 14th October, 1944, in O.S. No. 29 of 1943.

V. Subramanyam for Appellants.

K. Kotayya and *K. Ramamurti* for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellants are mother and daughter, the first appellant being the widow of one Venkata Krishnayya who died in 1936. Venkata Krishnayya was the undivided brother of the contesting respondent, the first defendant in the lower Court. The appellants filed the suit for a declaration that they were entitled to certain properties in lieu of maintenance as a consequence of the award of an arbitrator, who is impleaded as the fifth defendant in the suit. The allegations in the plaint were that the first plaintiff is legally entitled to a half share in the family properties for the maintenance of herself and her daughter, that the first defendant was refusing to give proper maintenance to the plaintiffs who threatened legal proceedings, whereupon mediators intervened, and on their suggestion the dispute was referred to the fifth defendant as an arbitrator, who decided that the suit properties should be given to the plaintiffs, that the plaintiffs got possession in pursuance of this decision but their possession was threatened by the first defendant and his supporters, defendants 2 to 4. Along with the plaint, a copy of the award Ex. P-1, dated 20th July, 1943, was filed.

The written statement of the first defendant denied that there was any failure to maintain the plaintiffs and alleged that the arbitration by the fifth defendant was collusive and that the award was vitiated by gross misconduct on the part of the arbitrator and that it was illegal because the arbitrator had exceeded the scope of the reference. There is also a plea that the suit for bare declaration was not maintainable, but no plea was taken regarding the non-registration of the award. The date of the award is 29th July, 1943. The suit was filed on the 7th August, 1943, and the first defendant's written statement was filed on 16th October, 1943, when there was still time to have the award registered. When the issues were framed, the question of non-registration was not made the subject of any issue.

* Appeal No. 534 of 1944. 20th November, 1945.

Even at this stage there was still time for the registration of the award. When the suit came on for trial, objection was taken by the first defendant to the receipt of the award in evidence on the ground that it was a document which was compulsorily registrable under section 17 (1) of the Indian Registration Act and had not been so registered. This contention succeeded before the trial Court which dismissed the suit without finding on the other contentions raised in the issues and also rejected, as a consequence of the dismissal of the suit, a petition filed by the plaintiffs praying that the plaint might be converted into an application under section 17 of the Indian Arbitration Act X of 1940.

The question which we have to decide in this appeal is therefore whether the lower Court was right in excluding the award on the ground that it was not registered. No doubt the objection was one which could have been met by the plaintiffs if it had been taken in the first instance in the written statement of the first defendant or at the time when the issues were framed. The belated nature of the objection is a matter which might well have been taken into consideration in awarding costs, but it cannot be a ground for treating the document as admissible in evidence if by law it is inadmissible.

The reference to arbitration is Ex. P-2 which is vague in its terms. It merely states that the dispute between the first plaintiff and her brother-in-law, the first defendant, was being referred to the arbitrator for settlement and that both parties agreed to abide by his decision. The first plaintiff also agreed to convey to her daughter the property which might be given for her share without effecting any alienation. It is also stipulated that, if either of the parties should fail to abide by the decision, the other party shall have the right to have the decision filed in Court and enforced through the Court.

Ex. P-1 the award after stating the nature of the dispute namely, the way in which the expenses of the maintenance of the first plaintiff and the education, protection and marriage of the second plaintiff should be met from the joint family property of the deceased husband of the first plaintiff, goes on to state that the arbitrator in consideration of the circumstances is making the "following arrangements." It provides that certain land should be utilised for the marriage of the second plaintiff either by selling the property or by some other means and that the property allotted to this purpose should be enjoyed by the first plaintiff pending marriage. Then follows a provision that certain property should be given for the maintenance of the two plaintiffs and for the dowry of the second plaintiff at the time of her marriage. Of the land so allotted it was decided that the first plaintiff should enjoy one acre for her life without the power of alienation and that after her death, the second plaintiff should take this one acre with full rights of gift, sale, etc., and the balance of one acre 5 cents should be taken delivery by the second plaintiff, that the whole of the two acres and five cents should be presented to the second plaintiff as dowry at the time of her marriage but that only one acre and five cents should be actually delivered to her on her joining her husband, the remaining acre passing to her only on the death of the first plaintiff. Then follow certain provisions regarding vessels and cattle, and it is provided that one half of the residential house should be enjoyed by the first plaintiff for life. The award concludes by reciting that the first plaintiff should take immediate possession of the lands allotted to her and that both parties should get the necessary documents executed and registered incurring the expenses in equal shares.

It has been held by the trial Court that this document creates an interest in immoveable properties worth more than Rs. 100 and that therefore it is compulsorily registrable. It is no doubt well settled (vide *Skinner* v. *Skinner*[1] and *Lakshmamma* v. *Kameswara*[2],) that when a document creates, declares, assigns, limits or extinguishes any right, title or interest in immoveable property of a value exceeding Rs. 100

1. (1929) 57 M.L.J. 765: I.R. 56 I.A. 363: I.L.R. 51 All. 771 (P.C.). 2. (1889) I.L.R. 13 Mad. 281.

it must be registered, even though the document itself contains a clause contemplating the execution of a more formal registered document in future. Since the amendment of the Registration Act in 1929, an arbitrator's award is not excluded from the operation of section 17. The only question is whether the award now under consideration does itself create, declare, assign, limit or extinguish any right, title or interest in immoveable property, or whether it merely creates a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest. If the latter is the case, then sub-clause (v) of clause (2) of section 17 will exempt the award from the necessity of registration.

When there is a dispute between parties and that dispute is referred to an arbitrator whose decision the parties agree to accept, there is, in fact, a contract between these parties, the final terms of which will embody the decision of the arbitrator on the point referred to him. If the nature of the contract between the parties is such that it actually declares or creates or assigns any interest in immoveable property, the award just like any other contract having that effect, must be registered. If, however, the contract between the parties merely relates to the terms on which one party shall have the right to demand from the other party a future conveyance of property, then the award which settles the terms upon which this future conveyance should be made, is nothing more than part of an agreement to convey, and it is well settled that an agreement to convey in future falls under the exception in section 17 (2) (v) of the Registration Act.

We are not concerned in the present case with a reference to an arbitrator concerning the division of properties to which the parties are already entitled. No doubt, in such a case, the completion of the bargain by the award of the arbitrator would of itself declare the shares in the title already possessed jointly by the disputants and no further conveyance would be necessary. The position in the present case was that the plaintiffs had a right to maintenance and the first plaintiff was demanding an assignment of property in lieu of the right to maintenance. The dispute concerned the quantum of property and the terms on which it should be assigned. The decision of the arbitrator settled this dispute but it did not of itself operate as a conveyance; nor could a mere declaration suffice to give title to the plaintiffs when a conveyance was obviously necessary. It seems to us therefore that the most that this award, read as part of the contract between the parties, could achieve was to give to the plaintiffs a right to require the first defendant to convey to them the property selected by the arbitrator. In this view, we are of the opinion that the award, Ex. P-1, stands on no higher footing than an agreement to transfer in future, and having regard to the terms of section 17 (2) (v) of the Indian Registration Act, it does not require to be registered.

In this view, we allow the appeal with costs and remand the suit to the trial Court for disposal on the merits. The trial Court will give the plaintiffs an opportunity, if they so desire, to amend the plaint so as to convert the suit into an application under section 17 of the Arbitration Act X of 1940.

The Court-fee on the memorandum of appeal will be refunded.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

The Executive Officer, Panchayat Board, Tadepalligudem .. *Petitioner**

v.

Bandapalli Ayodhyaramayya .. *Respondent.*

Madras Local Boards Act (XIV of 1920), sections 193 and 207—Obligation to obtain a licence under section 193—If on the owner or occupier of the property.

Though where there is no occupier the obligation to apply for and obtain a licence under section 193 of the Madras Local Boards Act is on the owner of the property, yet where there is an occupier who is responsible for doing the act or process which requires a licence, it is for him to make the application for such a licence and in either case it is the particular delinquent that could be charged under the provisions of section 207 read with section 193. Hence the burning of bricks by an occupier in a place belonging to an owner does not entail on the owner the liability under section 193 to apply for and obtain a licence and the latter would not be guilty of an offence under section 207 read with section 193 of the Act for failure to make such an application.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of acquittal dated 24th September, 1945, in C. C. Nos. 610, 611 and 629 of 1945, Stationary Sub-Magistrate's Court, Tadepalligudem.

B. V. Subramanyan for Petitioner.

S. Ramamoorthy for Respondent.

The Court made the folowing

ORDER.—These three cases raise the question whether the burning of bricks by an " occupier " in a place belonging to an owner entails on the owner the liability under section 193 of the Madras Local Boards Act to apply for and obtain a licence, and whether in the absence of such application by the owner, he is guilty of an offence under section 207 read with section 193 of that Act. It is admitted that the accused himself did not burn the bricks but that D. W. 2 did so as an occupier. The learned Magistrate who tried the case acquitted the accused on two grounds. The first is that there is no evidence that the accused himself burnt the bricks, and the second is that the burning of the bricks in this case was admittedly not in carrying out a trade but was for the private purpose of the occupier D.W. 2. He pointed out that in schedule VIII the description of the offence under section 193 is in the words " using a place for an offensive or dangerous trade without a licence." There is no evidence on record to show that the burning of bricks in these cases amounted to " an offensive or dangerous trade." It is not necessary to go into the second question. But with regard to the first, I am disposed to agree with the contention advanced on behalf of the respondent that where there is no occupier the obligation to apply for and obtain a licence under section 193 of the Madras Local Boards Act is on the owner, but where there is an occupier who was responsible for doing the Act or process which required a licence, it was for him to make the application and in either case it is the particular delinquent that should be charged under the provisions of section 207 read with section 193. It is significant that in sub-section (2) of section 193 it is mentioned that the " owner or occupier of every such place " shall apply to the executive officer of the panchayat for a licence. It is not enacted that both the owner and the occupier should do so. It is for the authority to make enquiries as to who actually used the place for any of the specified purposes and to proceed against such person. Since in this case it is admitted that the accused did not use the place for burning bricks but that D.W. 2 did so, I am of opinion that the Magistrate was right in acquitting the respondent in all these three cases.

The petitions are dismissed.

V.S. *Petitions dismissed.*

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* Cr. R. C. Nos. 91, 92 and 93 of 1946. (Cr. R. P. Nos. 88, 89 and 90 of 1946). 30th July, 1946.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Amritlal N. Shah .. *Petitioner**

v.

V. Nageswara Rao .. *Respondent.*

Criminal Procedure Code (V of 1898), section 145—Scope—Lessee ousted by lessor under order of magistrate procured on wrong information—If amounts to "forcible" eviction—Right to restoration of possession—Dropping of proceedings under section 145 (5)—When permissible—Absence of further violence—If ground for dropping proceedings—Continuance of breach of peace—If necessary for making final order.

Where it is found that the petitioner, a lessee, was in possession and had been evicted by the lessor only by notice obtained on incorrect representation to the Magistrate and it was only by the issue of a notice on such incorrect recitals that the petitioner's servants were made to vacate the building, it must be considered that there was a forcible eviction of the petitioner, and an order should be made declaring that the lessee is entitled to be in possession, that he was in possession, that he was forcibly ousted and is entitled to have his possession restored.

It is only if there has been a subsequent settlement or if the petitioner agreed to give up his lease and not to claim back possession of the property that action can be taken under section 145 (5) of the Code of Criminal Procedure and proceedings dropped. Merely because there has been no further violence, it could not be said that there cannot be a breach of the peace and that proceedings should be dropped. A continuance of the breach of the peace is not necessary before a final order could be passed. *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakkal*, (1912) 23 M.L.J. 499 : I.L.R. 36 Mad. 275, *Bai Jiba* v. *Ghandulal Ambalal*, A.I.R. 1926 Bom. 91 and *Gurditta* v. *Taza*, A.I.R. 1939 Lah. 108 relied on.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional First Class Magistrate of Rajahmundry dated 2nd March, 1945 and made in M.C. No. 12 of 1944.

D. Suryaprakasa Rao for Petitioner.

B. Jagannadha Das and *T. P. Gopalakrishna Aiyar* for Respondent.

The Court made the following

ORDER.—This is a petition to revise the order of the Additional First Class Magistrate of Rajahmundry in M.C. No. 12 of 1944 dropping further proceedings under section 145 (5), Criminal Procedure Code. The petitioner had taken on lease the Hanuman Palace also called Amrit Talkies in Lakshmivarapetta at Rajamundry from the respondent and another, and he was in possession of the same till 9th September, 1944. The petitioner is a person who belonged to Bangalore and he had taken this building on lease for running cinema shows. The petitioner had taken a licence. Representing to the District Magistrate that under the terms of the lease the licence should be taken by him only in the name of the lessor, the lessor, the respondent, got the licence issued to himself, and a notice was also issued saying that the respondent was entitled to possession. The notice ran as if the District Magistrate had consulted the Government Pleader and had accepted his opinion. Accordingly, when the petitioner was absent his manager and others were sent out and the respondent went to the Talkies got possession of the property and began to run the show. The petitioner got information from his manager and other servants and came to Rajamundry and filed this petition. A preliminary order was issued by the Magistrate, saying that there was a dispute about possession and an apprehension of a breach of the peace. The respondent was directed to file a statement. Inquiries were also made. Documents were filed. The learned District Magistrate found that the petitioner was in possession till 9th or 10th October, 1944, when he was dispossessed ; but he was of opinion that as there was no subsequent actual breach of the peace and as the parties were peaceful, no action need be taken and dropped the proceedings.

The Magistrate has found on the evidence that the petitioner was in possession and it is also in evidence that the notice was issued on incorrect information. There is nothing in the lease to indicate that the petitioner was not to obtain the licence in his own name but should obtain it in the lessor's name. To that extent, the

*Crl.R.C. No. 568 of 1945. 25th March, 1946.
(Crl. R.P. No. 527 of 1945).

representation was wrong and the Magistrate's notice was therefore based on incorrect information. This is not disputed, before me. But what is urged before me is that the lease contained a clause of forfeiture for non-payment of rent. As a matter of fact, this lease was originally for one year, and there was a subsequent settlement under which a larger rent was payable, and the petitioner was paying it. It is also in evidence that there was a suit for the rent prior to these proceedings and that there was no prayer in that suit for enforcing the forfeiture. From the records, it is clear that the petitioner was in possession till the date on which he was evicted, and it is true that they did not take up cudgels or use violence to resist the entry by the respondent. But there is no doubt that in the absence of the petitioner the manager and other servants had no other go, since the notice of the Magistrate was shown to them; and since it was a notice issued on a mistake, such an eviction should be considered to be an eviction by force. It is not in all cases that actual force should be used before it could be said that the eviction is a forcible one. Misrepresentation and improper threats besides these are sufficient to constitute forcible dispossession, and there were these in this case. It was by getting the licence cancelled and by getting it issued in the name of the lessor and by having the notice issued by the Magistrate that the servants and others were made to leave. Therefore it cannot be said that the preliminary order of the Magistrate saying that there was an apprehension of breach of the peace and that there was forcible dispossession was incorrect. As a matter of fact, the further proceedings clearly indicated this. But what happened is that the petitioner did not take the law into his own hands and enter on the property. If the contention of the respondent is to be accepted, it would mean that law-abiding citizens who are prepared to leave the matter to be decided by the Court instead of taking the law into their own hands are not to have the benefit of an order under section 145, if they are peaceful. This is not a case in which matters should have to be dropped by reason of section 145 (5). It is only if there has been a subsequent settlement or if the petitioner agreed to give up the lease hold right it and not claim to get back possession of the property, action can be taken under section 145 (5). Merely because there has been no further violence, it could not be said that there cannot be a breach of the peace and proceedings should be dropped. As it was found that the petitioner was in possession and had been evicted only by notice obtained on incorrect representation to the Magistrate and only by the issue of a notice on such incorrect recitals that the petitioner's servants have been made to vacate the building, it will have to be considered that there was a forcible eviction of a person entitled to be in possession.

As pointed out in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakkal*[1], it is not necessary that the continuance of a breach of the peace is necessary before a final order could be passed. Vide also *Bai Jiba* v. *Chandulal Ambalal*[2] and *Gurditta* v. *Taza*[3].

I accordingly set aside the order of the lower Court and instead declare that the petitioner is entitled to be in possession, that he was in possession, that he was forcibly ousted by the respondent, that he is entitled to have his possession restored, and that he will be put in possession of the property which is the subject-matter of these proceedings.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

The Executive Officer, Panchayat Board, Tadepalligudem .. *Petitioner**

v.

Bondapalli Ayodhyaramayya .. *Respondent.*

Madras Local Boards Act (XIV of 1920), sections 193, 207 and schedule VII—Storage and boiling of paddy without a license—Not made an offence punishable under the Act.

1. (1912) 23 M.L.J. 499 : I.L.R. 36 Mad. 275.
2. A.I.R. 1926 Bom. 91.
3. A.I.R. 1939 Lah. 108.

* Cr. R. C. Nos. 145 and 146 of 1946. (Cr. R. P. Nos. 139 and 140 of 1946). 30th July, 1946.

Storage and boiling of paddy without a licence has not been made an offence under any of the provisions of the Madras Local Boards Act. Neither of these items is specifically mentioned in schedule VII of the Act, nor could they come under the residuary item (*q*) of the same schedule. Hence, boiling of paddy or storing of paddy without a licence does not constitute an offence under section 193 and could not be made punishable under section 207.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of acquittal dated 28th September, 1945, in C. C. Nos. 613, and 614 of 1945, Stationary Sub-Magistrate's Court, Tadepalligudem.

B. V. Subramanyam for Petitioner.

S. Ramamoorthy for Respondent.

The Court made the following

ORDER.—These two cases can be dealt with together as they raise a common point. In one case the respondent-accused was charged by the Executive Officer, Panchayat Board, Tadepalligudem, who is the petitioner here, with having without a licence boiled paddy. In the other case he was charged with having stored paddy without a licence. The prosecution case was that for both these processes it was necessary for the accused to obtain licences under section 193 read with schedule VII of the Madras Local Boards Act. The learned Magistrate in acquitting the accused has pointed out that neither of these items is specifically mentioned in schedule VII and that therefore boiling of paddy or storing of paddy did not constitute offences under section 193 and could not be made punishable under section 207. He also considered the question whether they could come under the residuary item (*q*) of Schedule VII which speaks of a person generally " doing in the course of any industrial process anything which is likely to be offensive or dangerous to human life or health or property." It has been pointed out by the Magistrate that there is no evidence to show that either of these processes was likely to be offensive or dangerous to human life or public health. My attention has not been drawn to any other provision under which storage or boiling of paddy has been made an offence punishable under the Madras Local Boards Act. I see therefore no reason to interfere with the order made by the learned Magistrate.

The petitions are dismissed.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE SHAHABUDDIN.

Valli Ammal and others .. *Accused.**

Criminal Procedure Code (V of 1898), sections 236, 237, 403 and 423—Charges under section 302 and section 380 Indian Penal Code—Conviction for murder and acquittal under section 380—Acquittal by High Court of the charge under section 302—Conviction under section 411, Indian Penal Code—Permissibility—Murder—Lesser sentence—Justification.

The two appellants were charged with the offence of murder and convicted, the 1st being sentenced to death and the 2nd to transportation for life. The High Court held that the evidence against the 1st appellant showed beyond all reasonable doubts that she was responsible for or participated in the murder but that as she was a woman with a very young child, it was better to impose the lesser sentence so that the child will not be deprived of its natural guardian.

As regards the second appellant who was orginally charged under section 380, Indian Penal Code, also but was acquitted of that charge after the conviction for murder, the High Court held that there was no clear evidence that she participated in the murder and that she was therefore to be acquitted of the charge of murder. But the High Court felt that she was guilty under section 411, Indian Penal Code, of being in possession of property which she knew had been stolen from the person of the deceased. On a question whether she could be convicted under section 411, Indian Penal Code, in view of her acquittal of the charge under section 380, Indian Penal Code,

Held, that there was nothing in section 237 read with section 236 of the Criminal Procedure Code, to suggest that when a person is charged with murder, that person cannot be convicted of an offence under one of the property sections and therefore the second appellant could be convicted under section 411 even though not charged under that section. But even though section 423, Criminal Pro-

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*R.T. No. 251 of 1945 (Crl. Appeal Nos. 867 of 1945 and 37 of 1946.) 29th January, 1946.

-cedure Code empowers the High Court to do so, as the second appellant had been acquitted of the charge under section 380, Indian Penal Code—to which a charge under section 411 would be a minor charge—the doctrine of *autrefois acquit* prevented the High Court from now convicting that accused of that or any lesser offence. That appellant should not have been acquitted of the charge under section 380, Indian Penal Code, until the time for filing an appeal had expired.

Daulat Ram v. *King Emperor*, (1933) I.L.R. 8 Luck. 518 Not followed. *Begu* v. *King Emperor*, (1925) 48 M.L.J. 643 ; L.R. 52 I.A. 191 ; I.L.R. 6 Lah. 226 (P.C.). Referred to.

Trial referred by the Court of Session of the Tinnevelly Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 109 of the Calendar for 1945 on 20th November, 1945 and appeal by the said prisoner.

V. V. Radhakrishnan for 1st Accused.

T. C. Raghavan (Amicus curiae) for 3rd Accused.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Judgment of the Court was delivered by

Horwill, J.—The two appellants have been convicted by the learned Sessions Judge of Tinnevelly on a charge of murder.

There were three accused in the lower Court. The first was Valli Ammal, one of the appellants. She was sentenced to death. The other appellant was the third accused in the lower Court, who was sentenced to Transportation for life. The second accused in the lower Court was acquitted.

The deceased person had been suffering for a long time from cancer of the uterus, of which disease she was slowly dying. On account of this disease, there was a foul smelling discharge from her uterus, which made her presence unbearable to her husband, P. W. 3, and to his second wife, P.W. 4. The result was that she was removed to a separate hut, where she was cared for by the first and second accused, a mother and daughter, and at times by the third accused, a friend.

On the morning of Tuesday, the 14th of August last, the deceased was found lying dead with no marks of violence that were apparent to those who then saw her. Her jewels were however missing ; and when the doctor found that she had met her death by throttling, suspicion at once fell on the three accused, who had been attending on her. The third accused was questioned first by the police and she made a confessional statement. This led to the other two women being questioned, who also gave confessions. The confession of the second accused was not admissible under section 27 of the Evidence Act, because it did not lead to the discovery of any material fact. That is the reason why the learned Judge acquitted her. The learned Judge however admitted a great part of the confessional statements of the first and third accused ; and the portions admitted showed that they had participated in the murder. Upon reading through these confessional statements, we find that the learned Sessions Judge admitted more than was strictly necessary to discover the material fact that the jewels of the deceased woman were in the possession of the accused. The portion of Ex. E, the confessional statement of Valli Ammal, the first accused, which we consider to be admissible is this :—

"I removed the two pambadams and two mudichus worn in the ears and the gold suthuru worn in the neck by Tharuvai Achi, Chellathamma (deceased). We shared the jewels that night. I gave Meenakshi (third accused) the pair of pambadams taken from Tharuvai Achi. My daughter and myself took the remaining two gold muduchus and thali suthuru, taken from Tharuvai Achi. I have kept them in a pot in the store room of my house. I shall take out and produce the same."

The admissible portion of Ex. C the confessional statement of the third accused, is :—

"Valliammai (first accused) gave me the two pambadams removed from Tharuvai Achi's ears for my share. I tied them in a piece of cloth torn from my old saree and hid them in the roof of my house. I shall take out from the roof of my house, where I have kept and produce the pambadams of Tharuvai Achi given by Valliammai. By Tharuvai Achi I mean the deceased Chellathammal of the southern house".

When the first accused was questioned by the Committing Magistrate she admitted that she had been in possession of the jewels and that she had taken them from the person of the deceased. She said :

> "At about 9 A.M. on Tuesday morning, I went as usual to the house of the deceased. I called her 'amma, amma.' She was not conscious. But there was life. At once I removed the jewels on her body and returned. I tied all the jewels so removed in one cloth and hid them in the roof of Minakshi's house. These are the jewels—2 pambadams, 2 mudichus, and 1 suthuru—that I removed. These were not divided and I did not tell Meenakshi 'this is your share,' nor did I give her. It was I who took out this packet from the roof when questioned by the police. I gave this packet to the Sub-Inspector,"

and later on she said :

> "This woman was in a dying condition. She was not conscious. I removed them, thinking that 'If I remove and get away with the jewels now, nobody will suspect me and later on they can be sold and the sale proceeds appropriated'."

On these statements and on the evidence, the learned advocate for the first accused argues that the prosecution has not proved that she murdered the deceased woman. He considers his argument strengthened by the conduct of P. W. 3, the husband of the deceased woman, and P. W. 4, the second wife of P. W. 3. P. W. 3 seeing the deceased woman lying dead without her jewels, and apparently fearing that suspicion would fall on him and his wife, gave a very foolish statement to the Village Magistrate, Ex. B. In that statement P.W. 3 said :

> "I returned home from the fields this morning at about 10 A.M. for taking food. On coming home, my second wife Sudalai Ammal (P.W. 4) informed me that when she went to give water to the said first wife, she (Chellathammal) was unable to speak, her hands were shivering and the jewels in her neck and ears were missing. On my going at once and seeing her, there was hard breathing. The jewels on the neck and the jewels in the ears were missing. I sat by her side. In about half an hour, she died."

In Court, P. W. 3 said that he had given this statement out of fear, that it was not true, and that when he arrived in the morning his wife was already dead. Had this question whether the deceased was alive in the morning when P. W. 3 returned from his fields depended upon the evidence of P. Ws. 3 and 4 alone, we would have had considerable doubt whether they were speaking the truth ; but the matter seems to be concluded by the evidence of P. W. 1, the doctor who conducted the *post-mortem* examination. His evidence and his *post-mortem* certificate show that death was caused by asphyxia due to throttling. Many of the internal organs were congested, the hands and jaws clenched, and the neck was highly congested on both sides. There were also marks of finger nails on the throat. Since the deceased died of throttling, she could not have survived the throttling. In other words, she must have died while pressure was being applied to her neck or within a few minutes after the pressure was removed. The statement given by P. W. 3 to the Village Magistrate on the following morning could not therefore have been true.

Another witness, P. W. 5, was examined by the prosecution to prove that during the night, at about 10 P.M., accused 2 and 3 had been bathing, a circumstance so strange at that time of the night that it threw suspicion on these two accused. We find it difficult, however, to attach any particular significance to this fact and the learned Sessions Judge did not do so.

To sum up, the evidence against the first accused is that she took the jewels from the person of the deceased,—a circumstance in itself almost conclusive that she participated in the murder. Her statement in Court makes it clear that she removed the jewels from the deceased woman before she died or while she was dying. She said in the passage set out above that the deceased was not conscious, but that there was still life when she removed the jewels from her body. It is suggested that some other person, possibly P. W. 4, throttled the deceased and that during the few minutes that intervened between the throttling and death, the first accused might have entered the room where the deceased woman was lying and taken her jewels. In view of the undoubted circumstance that the object of the murder was the taking of the jewels and in view of the statement of the first accused herself and her confessional statement, we consider it to be certain beyond all reasonable doubt that the first accused was responsible for or participated in the murder.

The evidence that the third accused participated in the murder is not conclusive, because both her statement and the statement of the first accused merely show that some of the jewels that were on the deceased person were given by the first accused to the third accused as her share. This would show that the third accused knew that some offence had been committed; but it is not clear evidence, we consider, that the third accused participated in the murder. She has therefore to be acquitted of that charge.

It however seems to us that the third accused was guilty under section 411 of the Indian Penal Code of being in possession of property which she knew had been stolen from the person of the deceased. It has been argued on the authority of *Daulat Ram* v. *King-Emperor*[1] that when a person is charged with murder, he cannot be convicted of an offence under one of the property sections. Section 237 read with section 236 does not however suggest that any such limitation is placed on the Court. The appellant in C. A. No. 37 of 1945 could undoubtedly have been charged under section 411, in that her possession of the property was part of the evidence of her participation in the murder; and since she could have been charged under section 411 she could, under section 237, have been convicted under section 411. In *Begu* v. *King-Emperor*[2], their Lordships of the Privy Council had to consider whether a person who was charged under section 302 of the Indian Penal Code with murder could be convicted under section 201 of the Indian Penal Code of causing the disappearance of evidence. Their Lordships referred to sections 236 and 237 and held that in view of the wording of these sections they could entertain no doubt that the procedure adopted by the Court below, even though the accused was not specifically charged with that offence, was a proper procedure and one warranted by the Criminal Procedure Code. The argument in *Daulat Ram* v. *King-Emperor*[1] would apply equally to section 201 of the Indian Penal Code; and so must be deemed to enunciate bad law in the light of the Privy Council decision. We have therefore no doubt that the third accused could be convicted under section 411 even though not charged under that section.

There is however a difficulty in the way of our convicting this appellant under section 411, Indian Penal Code, even though section 423 of the Criminal Procedure Code would in our opinion empower us to do so; and that is that the third accused was originally charged under section 380, Indian Penal Code—to which section 411 would be a minor charge—which charge was separated from the charge of murder. After the Sessions Judge convicted the third accused of murder he acquitted her of the charge under section 380, the charge being withdrawn by the Public Prosecutor. As the appellant has been acquitted of the charge under section 380, Indian Penal Code, we feel that the doctrine of *autrefois acquit* prevents us from now convicting the accused of that or any lesser offence. Clearly, the appellant should not have been acquitted of this charge until the time for filing an appeal had expired.

Because of this difficulty in convicting the appellant under section 411, Indian Penal Code, the learned Assistant Public Prosecutor has argued that the appellant is guilty under section 201 of the Indian Penal Code of concealing evidence of an offence either of murder or of robbery with the intention of screening either herself or the first accused. We feel very doubtful whether she can be said to be guilty under this section; because the third accused did not take the jewels to screen an offender, but to cause unlawful gain to herself. The learned Assistant Public Prosecutor has attempted to distinguish between mere possession of the jewels by this appellant and the concealing of the jewels by placing them in the roof. As, however, the third accused is very poor and probably does not possess a trunk or any other suitable receptacle for keeping jewellery, we are not at all sure that the roof, the place from which the jewels were recovered, was not the natural place in which this appellant would have kept the jewels, even if she had obtained them honestly. We are not therefore satisfied that in placing the jewels where

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1. (1933) I.L.R. 8 Luck. 518.
2. (1925) 48 M.L.J. 643: L.R. 52 I.A. 191: I.L.R. 6 Lah. 226 (P.C.).

she did, the appellant attempted to screen either herself or the first accused from any charge.

The only remaining question is with regard to the sentence to be imposed on the first accused. We feel that as she is a woman with a very young child, it would be better to impose the lesser sentence, so that the child will not be deprived of its natural guardian.

In the result, the appeal by the first accused is allowed to the extent of reducing her sentence to one of transportation for life. The appeal of the third accused is allowed *in toto*. Her conviction and sentence are set aside, and it is ordered that she be set at liberty.

V.S. *Sentence on first accused reduced.*
Conviction of third accused set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

A. S. Varadaraja Ayyar .. *Appellant**

v.

Rama Pattar's son Kailasam Ayyar and others .. *Respondents.*

Registration Act (XVI of 1908), section 87—Charge entered into wrong book by mistake of the Registration Department—Subsequent mortgage—No application by mortgagee for encumbrance certificate—Suit to enforce charge—Mortgagee if can plead want of notice of charge—Mistake does not affect the validity of the charge and is binding on the mortgagee.

A stakeholder of a kurivari entered into an agreement with the subscribers and created a charge over certain of his properties as security for the benefit of the subscribers. This charge was entered into Book No. IV instead of Book No. I, by a mistake of the Registration Department. The same property was later mortgaged to a third party who did not take care to apply for an encumbrance certificate prior to taking the mortgage. After thirteen instalments had been paid and three remained unpaid, the stakeholder being dead, a new arrangement was entered into with his son, but there was nothing to show that the subscribers intended to abandon the charge created in their favour. In a suit by some of the subscribers, to recover the money paid by them it was contended by the mortgagee's representative that as he had no notice of the charge it was not binding on him and that the old agreement regarding the charge had been terminated by the new agreement.

Held, (1) that the mistake of the registering officer could not render the registration invalid and the transaction would be binding provided it did not injure innocent third parties. But the subsequent mortgagee by his failure to apply for an encumbrance certificate must be deemed to have had notice of the charge and hence the charge was binding on the parties.

(2) In the circumstances, the security created for the benefit of the subscribers was not abandoned by them under the new agreement and they were entitled to the benefit of the charge created under the old agreement.

Appeal against the decree of the District Court, South Malabar, dated 24th October, 1944, in A.S. No. 182 of 1943 preferred against the decree of the Court of the Subordinate Judge, South Malabar, at Palghat, in O.S. No. 27 of 1936.

N. A. Krishna Aiyar and *S. R. Subrahmanyam* for Appellant.

N. R. Sesha Aiyar and *S. Venkatachala Sastri* for Respondents.

The Court delivered the following

JUDGMENT.—A stakeholder of a kurivari entered into an agreement with the subscribers and created a charge over certain of his properties for the benefit of the subscribers, presumably to afford them some security for such of their moneys as might be in his hands. He later mortgaged the same property to the third defendant, whose rights subsequently devolved on the eleventh defendant, who is the appellant here.

The contesting respondents in this appeal are two subscribers, one of whom is the plaintiff, who sued for the return of the money subscribed by him. Some

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* S. A. No. 726 of 1945. 10th July, 1946.

difficulty has been created in this case because of a mistake made by the registration department in recording this mortgage in Book No. IV instead of in Book No. I. Two points have been argued by the learned counsel for the appellant. The first is that on account of this mistake of the registration department it would have been impossible for him to have obtained any information, had he so applied, of this charge and that it is not therefore binding on him. The second point argued was that it is shown in the plaint itself that the old contract, including the arrangement for the creating of a charge on the land, came to an end and was replaced by another agreement entered into between the stakeholders and the subscribers whereby the subscriptions were terminated and an arrangement made for the return of the moneys due to the various subscribers.

There can be no doubt in view of the many decisions referred to in the judgment of the lower appellate Court and the cases quoted before this Court that the fact that the registration department makes a mistake in entering a charge or a mortgage in the wrong book does not invalidate the mortgage. The question, however, is whether a third party, such as the appellant, would be entitled to plead that he was not bound by it because of the mistake made. In *Sateendranath Chowdhuri* v. *Jateendranath Chowdhuri*[1], their Lordships of the Privy Council had to consider the question whether despite the mistake made by the registration department the mortgage was nevertheless valid ; and they held that the mistake of the registration department was a mere defect in procedure covered by section 87 of the Registration Act and that therefore the act of registration done in good faith by the registering officer would not render the registration invalid. The learned advocate for the appellant relies on an old case of this Court, *Narasamma* v. *Subbarayudu*[2], in which the rights of a third party were considered ; and it was held that he could not be prejudiced by the negligence of the alienee in not getting the mistake made by the registration department rectified. There is nothing in the judgment, however, to indicate whether the third party in that case applied for an encumbrance certificate or not. This decision was interpreted in a much later case of this Court, *Subbalakshmi Ammal* v. *Narasimiah*[3]. The learned Judges there held that the mistake made by the registration department was a mere defect in procedure which did not invalidate the mortgage. They then proceeded to consider whether the decision in *Narasamma* v. *Subbarayudu*[2] had any bearing on the case under consideration. They held that it did not and said :

> "The subsequent observations in the judgment also show that one of the main considerations which influenced them (the learned Judges in *Narasamma* v. *Subbarayudu*[2]) in arriving at their conclusion was the fact that in that case the property had passed to a third party for consideration and that he should not be made to suffer because the parties to the document did not take sufficient care to get the document entered in the proper book in the registration office."

It was similarly pointed out in the Privy Council decision above referred that it was a transaction which was binding provided it did not injure innocent persons. Can it be said in the present case that the third defendant was injured or suffered by the negligence of the subscribers in not getting rectified the mistake made by the registering officer ? Under section 3 of the Transfer of Property Act,

> "a person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it."

Assuming that the third defendant had no actual knowledge of the agreement and of the charge on the property, he admittedly abstained from making any enquiry or search. The documents in the third defendant's favour contained a recital of the mortgagor that these properties were not encumbered ; but the third defendant should clearly not have contented himself with the mere asseveration by the stakeholder that there was no encumbrance on the property. He should have made further enquiries ; but did not do so. Therefore he must be deemed to have had notice of this alienation. He could not be said to be injured by this

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1. (1935) 69 M.L.J. 503 : L.R. 62 I.A. 265 : I.L.R. 63 Cal. 1 (P.C.).
2. (1895) I.L.R. 18 Mad. 364.
3. (1927) 52 M.L.J. 482 at 489.

negligence of the subscribers when he made no enquiry of any kind. If he had applied for an encumbrance certificate and had been told that there was none and had taken action on that representation by the Registrar, then he would undoubtedly have been injured by the negligence of the subscribers ; but he could not be injured if the action taken by him did not arise out of the negligence of the subscribers. I entirely agree with the lower Court in holding that this charge is binding on the appellant.

According to the plaint, after thirteen instalments had been paid and only three instalments remained to be paid, the stakeholder being dead, his son entered into an agreement with the subscribers whereby they decided that there was no need to auction the last three instalments, and that after certain deductions were made, the sum in hand should be divided amongst the subscribers each according to his share on the instalment dates. It is argued that the old agreement was thereby abandoned and replaced by this new agreement. It does seem as if this was a variation to the original agreement entered into ; but even if it was, there is no reason to believe that the subscribers intended to abandon the charge that had been created in their favour to secure money that they had paid. It was in order to protect them against such a contingency as this that the charge was created. Even if the parties entered into a new agreement regarding the remaining instalments, they almost certainly intended that the agreement with regard to the charge on the property should be carried forward and become a part of the new agreement. It is argued by Mr. Ramakrishna Aiyar that the plaint does not say so. It is true that it does not do so in so many words ; but there can be no doubt, upon reading the plaint as a whole, that the plaintiffs did claim that they were entitled under the new agreement to a charge that had been created by the original agreement. I am therefore not prepared to say that the security which the subscribers had insisted upon creating for their own protection was abandoned in the new agreement.

On both the grounds the appeal fails and is dismissed with costs, one set.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Murikipudi Ankamma .. *Appellant**

v.

Tummalacheruvu Narasayya and others .. *Respondents.*

Gift deed—Construction—Gift if conditional or absolute—Revocation by a later document—Validity—Subsequent sales by donor and donee to different persons—Rights of parties—Transfer of Property Act (IV of 1882), *section* 41—*Applicability—Transferee from donor if entitled to any equity.*

A donor by a deed of gift conveyed to the donee the suit properties and the relevant words in the deed were to this effect, "I have a belief that you would maintain me well during my lifetime. And as I bear affection towards you, I have got the idea of conveying my property to you. Therefore *I have conveyed to you* under *dhakal* the property worth Rs. 800."

By a later document, he revoked the same and some years later sold the suit properties to the appellant. The donee in his turn sold the same properties to the plaintiff. In a suit by the plaintiff for a declaration of his right under the sale to him and for possession it was contended that the gift deed was conditional and that the donor was entitled to revoke it when the condition was not fulfilled and that therefore the revocation was valid and the donor had the right to transfer the properties to the appellant.

Held, that the gift deed was valid, that it was not conditional but absolute, that it was intended to be given effect to and had been actually acted upon and therefore the revocation by the later deed was not valid and operative.

Balbhadar v. *Lakshmi Bai*, A.I.R. 1930 All. 669, explained.

Passage in *White and Tudor's Leading Cases*, 6th edition, page 353, referred to.

On a further contention that the appellant was entitled to the equity contemplated by section 41 of the Transfer of Property Act as a transferee from an ostensible owner,

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* S. A. No. 64 of 1945. 12th March, 1946.

Held, that the present case did not fall within section 41 of the Transfer of Property Act. If the donor had power of revocation, and he validly revoked the gift, he became the absolute owner. If he had no power of revocation at all, he ceased to have any interest or right in the property on his divesting himself of his title in favour of the donee, in which case there is no question of the donor continuing after the gift to be an ostensible owner, and of any equity arising in favour of his transferee under section 41 of the Transfer of Property Act.

Appeal against the decree of the Court of the Subordinate Judge, Guntur, dated 28th July, 1944, in A. S. No. 383 of 1943, preferred against the decree of the Court of the District Munsiff, Gurzala, dated 26th August, 1943, in O. S. No. 290 of 1942.

N. Subramaniam and *D. V. Reddi Pantulu* for Appellant.

Ch. Raghava Rao and *G. C. V. Subba Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant in O. S. No. 290 of 1942, District Munsiff's Court, Gurzala, is the appellant in this appeal. K. Papayya who owned certain properties in Piduguralla and another village executed a deed of gift Ex. D-3 on 10th June, 1931, in favour of the 5th defendant, T. Hanumayya. It would appear that Papayya had a son who died and subsequently there was a partition between Papayya and his grandson and thereafter there was nobody to take care of him. He therefore took the 5th defendant Hanumayya to his house for the purpose of looking after him and assisting him in the management of the property. It is for this reason that the gift was made in favour of the 5th defendant who was closely related to the donor. It is the appellant's case that Hanumayya after a short stay with Papayya left Piduguralla and went back to his own native place Mallavolu and ceased to bestow any attention on Papayya or render him any assistance as expected. For this reason, it is alleged, Papayya revoked the gift deed Ex. D-3 by means of the deed of revocation Ex. D-4 dated 26th September, 1933. The differences between them are said to have been ultimately composed by mediators in 1934 under an arrangement by which half the suit properties were to revert to Papayya and the remaining half to continue to belong to the 5th defendant, the donee. Papayya sold under Ex. D-1 on 6th December, 1937, the suit properties to the appellant and the appellant claims that in spite of the gift deed Ex. D-3, Papayya had continued to be in possession of the suit properties until the date of Ex. D-1 and that after the sale under Ex. D-1 the appellant continued to be in possession of those properties until the date of suit. On 11th September, 1941, the 5th defendant Hanumayya sold the suit lands under Ex. P-1 to the plaintiff, the 1st respondent. The plaintiff's case is that ever since the date of the gift Ex. D-3, dated 10th June, 1931, the donee (his vendor) was in possession of the properties until his sale and that soon after that sale, that is, in December, 1941, or thereabouts, he, the plaintiff, was dispossessed by the defendant and his party. The plaintiff therefore brought the suit for a declaration of his right under the sale, Ex. P-1 dated 11th September, 1941, for possession of the property, for a permanent injunction against the defendants and for past and future mesne profits. The trial Court dismissed the suit holding that the gift deed, Ex. D-3, was conditional and that consequently, the donor was entitled to revoke it, the condition that was not fulfilled being that the donor must be maintained by the donee during his lifetime. It was therefore held that the revocation was valid. With reference to the oral arrangement that was said to have been made by the mediators, that was also found to be true. The plaintiff-respondent was therefore held to be estopped from disputing the title of the appellant. On appeal the learned Subordinate Judge reversed the decree of the trial Court and found that the gift was not conditional but absolute, that the donor had no power to revoke it and that consequently the revocation was not valid. He also found against the mediation and the oral arrangement and held that without such a plea there was no estoppel.

The main question for determination in the appeal is whether the gift under Ex. D-3 was conditional in the sense that if that condition was not fulfilled, it was open to the donor to revoke the deed. The relevant portion in Ex. D-3 is this :

"I had a son and he died. My wife also died. I am now aged 60 years and I have no strength to look after my own affairs and my agricultural duties. So about 4 years ago I brought you who are my uterine younger brother's son and kept you in my house. From that time, you alone have been looking after my cultivation works, etc., in my house, have been living in my house alone and maintaining me well. *I have a belief that you would maintain me well during my lifetime.* And as I bear affection towards you, I have got the idea of conveying my property to you. Therefore, I have conveyed to you under *dhakal* the property worth Rs. 800."

The particular portion upon which reliance is placed to show that the deed of gift was conditional has been underlined (italicised) in the above passage. In the context of the document all that appears to have been entertained in the mind of the donor at the time was a hope or a wish that the donee would continue to bestow the same care and attention on him as he used to do before and that he would maintain him well during his lifetime. I am in agreement with the view taken by the learned Subordinate Judge that the obligation to maintain was not cast upon the donor as a necessary or an essential condition of the grant. The gift was entirely out of love and affection and the reference to maintenance was only as a matter of fond wish. In this view, it is not possible to agree with the appellant's contention that in the absence of any express reservation of a power of revocation, the donor continued to have that right, even after he had divested himself of all the right, title and interest in the property by means of this gift and after he had duly vested the property in the donee. The document itself further recites that the property had then alone been delivered into the possession of the donee.

A great deal has been said about the non-delivery of the deed of gift to the donee and about the continuance of the gifted property in the possession of the donor. The learned Subordinate Judge considered both these aspects and has found with reference to possession that the donee obtained possession of the property, and with regard to the retention of the gift deed by the donor, that that circumstance by itself did not indicate that the gift was not intended to be acted upon or that the 5th defendant had not accepted it. The entire course of conduct of the 5th defendant (the donee) shows that he accepted the gift. With regard to the custody of the document, it would appear, as remarked by the lower appellate Court, that the document was kept in the family box to which the 5th defendant also had access. When he left the donor's village, he had no idea at all that the gift deed would be revoked sometime later. Therefore there was no necessity to take away the gift deed with him. In these circumstances, the learned Subordinate Judge was right in holding that the mere custody of the document does not lead to any adverse conclusion against the 5th defendant.

With reference to possession, reliance is placed on behalf of the appellant on cist receipts, lease deeds and also on the transfer of the patta which was made on 19th February, 1939, under Ex. D-5. It has been pointed out by the learned Subordinate Judge that the transfer was admittedly done without notice to the 5th defendant who was then the pattadar and without any enquiry. That statement has not been challenged before me. The cist receipts do not specifically refer to the suit lands by their survey number. The survey numbers of the suit lands are 795/4-A and 795/1-B. Such of the receipts as relate to Piduguralla refer to certain other number and there is no evidence to connect this number with the suit lands. The learned Subordinate Judge, however, adverted to Ex. P-3, Ex. P-4 and Ex. D-9, and said that those cist receipts show that it was the 5th defendant who paid the cist on the lands from fasli 1342 to fasli 1346 and that the patta for the lands stood in the 5th defendant's name till the mutation was effected in February, 1939. The other cist receipts do not throw any further light on the question. The lease deeds which have been filed by the appellant relate to a period subsequent to 1937. They are Ex. D-6 dated 10th May, 1938, Ex. D-7 dated 16th May, 1940, and Ex. D-8 dated 23rd March, 1942. These lease deeds are also not of much evidentiary value, because none of the lessees who is said to have taken the lease has been examined to show that there was actually enjoyment of the suit lands on behalf of the appellant during that period. In this state of the evidence, I find little difficulty in accepting the finding of the learned Subordinate Judge that the

gift deed is true and valid, that it is not conditional and that it was intended to be given effect to and was actually acted upon. The revocation of that gift under Ex. D-4 is, it follows, not valid and operative.

Turning next to the alleged oral arrangement of 1934 under which some partition of the property is said to have been made between the donor and the donee, the matter has been gone into fully by the learned Subordinate Judge and he finds after examining the evidence of P. Ws. 4, 5 and 6 who spoke to this part of the case that the entire story about the mediation and settlement is not true and that the evidence of P. Ws. 4, 5 and 6 is not to be relied upon. In view of that finding of fact with which I agree, it is not necessary to examine in detail the evidence relating to the oral arrangement.

Mr. Subramaniam, the learned advocate for the appellant, has drawn attention to a decision of the Allahabad High Court in *Balbhadar* v. *Lakshmi Bai*[1] and argues on the authority of that case that even if it was a mere expectation that was entertained by the donor at the time of the gift, so long as that expectation was not fulfilled, it was open to the donor to revoke the gift. I do not read that decision to lay down any such broad proposition. That was a case which proceeded on its own facts and on those facts there can be no doubt that the particular provision contained in the deed there, namely, that the donee should discharge the specified debts of the donor amounted to a condition whose non-performance by the donee entitled the donor to revoke the deed. Although the word "expectation" is used in the judgment, it is clear that what the learned Judges meant to convey was that the provision in question amounted to a condition. The relevant passage is this :

> "Under Hindu Law, if a person makes a gift to another in expectation that the donee will do some work in consideration of the gift, it follows that if the donee failed to do that which it has conditioned he should do, the gift is revocable : *Mahadeo* v. *Badamo*[2]. It is arguable that in the absence of an express power of revocation for failure of a condition, the gift cannot be impugned or revoked."

While I am on this decision, I would advert to another part of the judgment where a passage has been extracted from White and Tudor's Leading Cases, which has a relevant bearing upon the question at issue in this appeal. The passage runs thus :

> "if a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a Court of Equity will not loose the fetters he has put upon himself, but he must lie down under his own folly." (White and Tudor's Leading Cases, 6th edition, page 353.)

The next argument of the learned advocate for the appellant is that the case falls within section 41 of the Transfer of Property Act and that he is entitled to the equity contemplated in that provision. He complains that although there was a finding in his favour in the judgment of the trial Court, the learned Subordinate Judge did not go into that aspect. The so-called finding in the trial Judge's judgment that is relied on is a stray sentence in the paragraph headed "issue 3" to the following effect "Moreover it is clear that the sale in favour of the plaintiff is not a *bona fide* one." There is no discussion with regard to the essential features that fall to be examined under section 41 of the Transfer of Property Act. In fact, there were no averments in the plaint such as were necessary for the purpose of invoking this equity ; nor was any issue taken specifically on that question. Mr. Subramaniam is not in a position to state that this question was definitely raised or argued before the learned Subordinate Judge. In these circumstances I do not see any substance in the complaint that the question of the applicability of section 41 of the Transfer of Property Act was not examined by the lower Appellate Court. I do not consider that even otherwise this case is one which falls under section 41. This is a case where a donor contends that the gift was duly revoked by him on account of the failure of a certain condition which was laid down in the deed. If he had the power of revocation, and he validly revoked the gift, he became the absolute owner. If he had no power of revocation at all, he ceased to have any interest or right

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1. A.I.R. 1930 All. 669. 2. (1873) 5 N.W.P. H.C.R. 5.

in the property on his divesting himself of his title in favour of the donee in which case there is no question of the donor continuing after the gift to be an ostensible owner, and of any equity arising in his favour within the meaning of section 41 of the Transfer of Property Act.

In the result the appeal is dismissed with costs. No leave.

In the forefront of his judgment the learned Subordinate Judge has chosen to make this observation about the judgment of the learned District Munsiff:

"I may at once state that I am not concerned here with the grammatical errors, incorrect use of words or phrases, incoherency of sentences and confusion in the judgment of the lower Court. All these could have been avoided with a little patience and care."

I must say in fairness to the learned District Munsiff that I have been through his judgment and I do not agree with this criticism.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUPPUSWAMI AYYAR.

Bhadri Venkataswami .. *Appellant**

v.

Mandi Tata Reddy and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 53—Promissory note executed by father—Death of father—Suit against sons—Decree against father's share in joint family estate—Whether can be passed.

Where the sons of the maker of a promissory note are sued on the note after the death of their father the Court can pass a decree against them so as to render them liable not only to the extent of the father's separate property but also to the extent of his share in the joint family property in their hands.

Potharaju v. *Appala Naidu*, (1944) 2 M.L.J. 82, approved.

Nataraja Chettiar v. *Perumal Ammal*, (1942) 2 M.L.J. 668, overruled.

Appeal against the decree of the Court of the Subordinate Judge, Nellore, in A. S. No. 317 of 1943, preferred against the decree of the Court of the Additional District Munsiff, Nellore, in O. S. No. 501 of 1940.

T. V. R. Tatachari for Appellant.

A. C. Sampath Aiyangar and *S. Krishnamachariar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—On the 20th August, 1937, Govinda Reddi, the father of the respondents, executed a promissory note in favour of one Sankariah, who on the 1st July, 1940, indorsed it to the appellant. On the 16th August, 1940, the appellant filed a suit to enforce the payment of the promissory note. Govinda Reddi had died in the meantime and the respondents were made the second and third defendants as his legal representatives. The first defendant was the brother of Govinda Reddi. The indorsement of the promissory note in favour of the appellant admittedly only operated to transfer the instrument and not the debt in respect of which it was made. Therefore the appellant was not in a position to maintain the suit against the brother of the maker, but only against the maker's legal representatives. The trial Court (the Court of the District Munsiff of Nellore) dismissed the suit in its entirety on the ground that it was not maintainable against any of the defendants because the action was on the instrument itself and the defendants were not parties to it. On appeal, the Subordinate Judge of Nellore decreed the suit against the respondents, limited, however, to the separate assets of their deceased father in their hands. The plaintiff has appealed. He says that by virtue of section 53 of the Code of Civil Procedure he is entitled to a decree against the sons

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* S. A. No. 1526 of 1945. 22nd August, 1946.

of Govinda Reddi covering his share in the ancestral property as well as his separate assets in the hands of his sons. The case has been placed before a Bench for decision as judgments of this Court delivered by Judges sitting alone are in conflict.

The appeal depends on the effect to be given to section 53 of the Code of Civil Procedure; and before referring to the judgments in conflict we will set out the terms of the section. It reads as follows:

> "For the purposes of section 50 and section 52 property in the hands of a son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the sons or other descendants as his legal representative."

This section was inserted in the Code of 1908 as there was a difference of opinion in the High Courts of India on the question whether the interest of the father in the joint family estate was available for his creditors as his own property when in the hands of his sons as the surviving coparceners. The section now makes it quite clear that for the purposes of sections 50 and 52 of the Code sons have to be regarded as the legal representatives of their deceased father even in respect of his share of the family estate which devolved upon them by survivorship.

In *Nataraja Chettiar* v. *Perumal Ammal*[1], Horwill, J., held that the sons of the maker of a promissory note were liable only to the extent of the father's separate property which had come into their hands and not to the extent of his share of the joint family property. The learned Judge referred to section 53 but he gave no reason for limiting its application to the father's separate property in their hands. The case in conflict is *Potharaju* v. *Appala Naidu*[2], where Chandrasekhara Aiyar, J., passed a decree against the sons of a Hindu father who had executed a promissory note without limiting its execution to the separate property of the father. The learned Judge did not, however, refer to section 53 of the Code of Civil Procedure.

We consider that in view of section 53, the Subordinate Judge should not have limited the decree to the separate assets of the father in the hands of the sons, but he should have made it apply as well to the share of the father in the family estate in the hands of the sons. They are his legal representatives in respect of all kinds of property in which he had an interest, when it comes to enforcing payment of a debt due by his estate.

The decree of the Subordinate Judge will be amended accordingly. The appellant is entitled to his costs in this Court and before the Subordinate Judge.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUPPUSWAMI AYYAR.

Bridget Souza Bai .. *Appellant**

v.

Maria Louis Bai and others .. *Respondents.*

Transfer of Property Act (IV of 1882), sections 114-A and 117—Permanent lease of agricultural land—Covenant by lessee not to alienate or charge leased property—Creation of usufructuary mortgage by lessee—Forfeiture of lease by lessor—Validity of notice—Opportunity to remedy breach not given.

The plaintiff's predecessor in title granted a permanent lease of a plot of agricultural land to the first defendant at a certain rent. The lease contained a covenant by the lessee that the land should not be alienated in any manner to anyone else and should not be given as security for any pecuniary obligation of the lessee. Notwithstanding the above covenant the lessee granted a usufructuary mortgage of the leased property to secure a loan. Subsequently, the lessor gave the lessee notice of forfeiture of the lease for breach of the covenant. The lessee having refused to vacate the property, the plaintiff sued for ejectment. The defendant contended that there was no breach of covenant in as much as the mortgagee had not taken possession of the property.

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1. (1942) 2 M.L.J. 668. 2. (1944) 2 M.L.J. 82.

* L.P.A. No. 54 of 1945. 19th July, 1946.

Held, that although the usufructuary mortgage did not in law amount to an assignment of the property and there had been no parting with possession, the forfeiture clause came into operation by reason of the fact that the lessee had charged the property to secure a loan.

Held, however, that the plaintiff was not entitled to a decree for ejectment because the notice which he served on the defendant did not give the latter an opportunity of remedying the breach of the covenant in the lease.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Patanjali Sastri, J., in S.A. No. 543 of 1944 preferred against the decree of the Court of the Subordinate Judge, South Kanara, in A.S. No. 73 of 1943 preferred against the decree of the Court of the District Munsiff of Karkal in O.S. No. 419 of 1940.

B. Pocker for Appellant.

Messrs. Pais, Lobo and *Alvares* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The property in suit is of very small value, but the action has given rise to much argument in three Courts below and in this Court. On the 4th October, 1916, the appellant's predecessor in title granted a permanent (mulgeni) lease of a plot of agricultural land measuring a quarter of an acre to the first defendant at a rent of 8 annas per year. The lease contained a covenant by the lessee that the land should not be "alienated in any manner to any one else" and should not be given as security for any pecuniary obligation of the lessee. On the 8th January, 1935, notwithstanding this covenant, the lessee granted a usufructuary mortgage of the property to secure a loan of Rs. 1,000 which was to be repaid by the 30th April, 1940. By this time the lessee had built a house on the land. On the 8th September, 1940, the lessor gave to the lessee notice of forfeiture of the lease for breach of the covenant. The lessee refused to vacate the property and this resulted in the lessor filing a suit for ejectment in the Court of the District Munsiff of Karkal. The District Munsiff decreed the suit, but on appeal the Subordinate Judge reversed the decree of the District Munsiff and dismissed the suit. The Subordinate Judge held that there had been no valid forfeiture as the plaintiff had not given a notice in the terms required by section 114-A of the Transfer of Property Act. He found as a fact that although the tenant had purported to create a usufructuary mortgage, he had not given possession of the property to the mortgagee. The plaintiff then appealed to this Court. His appeal was heard by Patanjali Sastri, J., who held that the creation of the mortgage entitled the lessor to forfeit the lease, but that the suit could not be maintained as the notice did not give the tenant an opportunity of remedying the breach, which means an opportunity of redeeming the mortgage.

Section 114-A was inserted in the Transfer of Property Act by the amending Act of 1929. The section reads as follows :

"Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

(a) specifying the particular breach complained of; and (b) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent."

Although the usufructuary mortgage did not in law amount to an assignment of the property and there had been no parting with possession, the forfeiture clause in the lease came into operation by reason of the fact that the lessee had charged the property to secure a loan.

Section 117 of the Transfer of Property Act takes agricultural leases out of the purview of the provisions of Chapter V of the Act ; but in *Krishna Shetti* v. *Gilbert*

Pinto[1], a Full Bench of this Court held that notwithstanding section 117 the Courts of this country could grant relief against forfeiture on the principles applied by the Court of Chancery in England and this decision has been followed in this Province ever since. Therefore it is well settled that notwithstanding section 117 the Court can grant relief against forfeiture in spite of section 117. The learned Judge pointed out that section 114-A is modelled on section 14, sub-sections (1) and (6) of the English Conveyancing and Law of Property Act, 1881, and that it is open to the Court to give relief against forfeiture of an agricultural lease when the notice of forfeiture is not in accordance with the section, not because the section operates but because it embodies an equitable principle which the Court can apply. We agree with this.

The notice which the plaintiff served upon the first defendant did not give him an opportunity of remedying the breach. The payment of the mortgage would mean a complete remedying of the breach. As a matter of fact, the first defendant avers that he has redeemed the mortgage, but there has been no finding on this question. We hold that the lessor is not entitled to maintain the suit for ejectment in the circumstances and consequently we concur in the judgment under appeal. If the mortgage is still subsisting, it will be open to the lessor to serve a fresh notice and institute a fresh suit if the terms for the notice are not complied with.

The appeal is dismissed with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Bommareddi Satyanarayana Reddi .. *Petitioner.**

Criminal Procedure Code (V of 1898), sections 225, 227, 229 and 230—Magistrate hearing evidence against accused charged with offences under sections 323, 325 and 355, Indian Penal Code—Charge under section 323 alone framed—At a later stage fresh charges under the other two sections also framed—Jurisdiction to do so, whether exists.

A Magistrate, after hearing evidence in a case where an accused was charged with offences under sections 323, 325 and 355 of the Indian Penal Code, framed only a charge under section 323, but subsequently he added the charges under sections 325 and 355 also. On a contention that the act of the magistrate in framing a charge only under section 323 in the first instance amounted to a discharge of the accused under sections 325 and 355 and that thereafter the magistrate had no jurisdiction to frame the additional charges,

Held, that the magistrate had jurisdiction to do so. Even assuming that there was an implied discharge as contended for, that would not preclude a fresh complaint being made in respect of those offences. Further, section 227 of the Criminal Procedure Code empowers the Court at any time before judgment is pronounced to alter or add to any charge. It is clear from the sections that follow section 227 that what the Legislature intended was that the Court may add a new charge at any time before judgment is pronounced, provided that the safeguards mentioned in section 225 were observed. Moreover in sections 229 and 230 of the Code reference is made to a 'new charge' in addition to an altered or an added charge. This clearly shows that in section 227 in the words 'added to' the concept of a new charge is implicit.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the additional charges framed by the Stationary Sub-Magistrate, Bezwada taluk, on 14th June, 1946, in C.C. No. 9 of 1946 on his file.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is an application to quash two additional charges framed by the Sub-Magistrate of Bezwada against the petitioner who is the accused in C.C. No. 9 of 1946 on the file of that Court. The case started on a private complaint in which the petitioner was charged with having committed offences under sections 323, 325 and 355 of the Indian Penal Code. After hearing the evidence adduced

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1. (1919) 36 M.L.J. 367 ; I.L.R. 42 Mad. 654 (F.B.).

* Crl. M.P. No. 998 of 1946. 4th September, 1946.

for the complainant, the Magistrate framed a charge only under section 323, but subsequently, he added the charges under sections 325 and 355 and it is with reference to these additional charges that this application is filed.

The contention of the learned advocate for the petitioner is that the act of the Magistrate in framing a charge only under section 323 when the complaint alleged three specific offences, amounted to a discharge of the petitioner under sections 325 and 355, and after that discharge was made the Magistrate had no jurisdiction to frame the additional charges. He contends that that would amount to a reviewing of the case for discharge which the Magistrate was not competent to do. The machinery provided under the Code of moving higher authorities to set aside the order of discharge it is urged should have been availed of by the complainant if he felt aggrieved. The learned Public Prosecutor points out that even assuming for argument's sake that the framing of the charge at the earlier stage under section 323 alone amounted to an implied discharge under sections 325 and 355 of the Indian Penal Code, it has been held in a number of cases in this Court that that would not preclude a fresh complaint being made in respect of those offences. In *Emperor* v. *Chinna Kaliappa Gounden*[1] and in In re *Ponnuswami Goundan*[2], two Full Bench cases of this Court, it was held that in such circumstances the filing of a fresh complaint is not prohibited, and that such would be the case even where the order of dismissal of the complaint had not been set aside. Further it has to be pointed out that section 227 of the Code of Criminal Procedure empowers the Court at any time before judgment is pronounced to alter or add to any charge. Necessary safeguards are provided in section 228 to avoid any prejudice being caused to the accused by reason of the alteration or addition. The learned advocate for the petitioner argues that the expression "add to" in section 227 means the addition of a few words to the existing charge and not the addition of a new charge. I cannot accept this argument. If what was intended was to empower the Court only to make some corrections or additions to the existing charge, the word "alter" occurring in the section would have met the requirements and it was not necessary to enact the words "add to". Redundance cannot be attributed to the Legislature and it is clear from the sections that follow section 227 that what the Legislature intended was that the Court may add a new charge at any time before judgment is pronounced provided that the safeguards mentioned in section 225 were duly observed. It may be pointed out that in section 229 and section 230 of the Code reference is made to a "new charge" in addition to an altered or an added charge. This clearly shows that in section 227 in the words "added to" the concept of a new charge is implicit. I find no force in the contention of the learned advocate for the petitioner that the Magistrate had no jurisdiction to add these new charges at a later stage after once he had framed only one charge under section 323 of the Indian Penal Code.

The petition is dismissed.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE KUNHI RAMAN.

A. V. Govindaswamy Chetty and others .. *Plaintiffs**

v.

Narayanaswamy Naidu and others .. *Defendants.*

D. Nagendra Chetty .. *Attaching decree-holder.*

Madras High Court (Original Side Rules), Order XVII, rule 7—Decree-holder getting his costs taxed by the proper officer but failing to get the same entered in the margin of the decree within time—If can execute the decree for costs.

1. (1905) 16 M.L.J. 79 : I.L.R. 29 Mad. 126 (F.B.).

2. (1931) 62 M.L.J. 469 : I.L.R. 55 Mad. 622 (F.B.).

* E.P. No. 117 of 1944 in C.S. No. 37 of 1937. 17th September, 1945.

A decree-holder who has had the costs awarded to him taxed by the proper officer, but has failed to have the taxed costs entered within time in the margin of the decree as required by Order XVII, rule 7 of the Original Side Rules of the Madras High Court cannot execute his decree for costs. Where the decree in the usual form prescribed by Order XVII, rule 7 of the Original Side Rules provides for costs "when taxed and noted in the margin hereof", the decree-holder cannot say that it is a mere superfluity to note the costs in the margin of the decree. It cannot be contended that it is only one of several methods of proving what the amount of the costs is and that it would be open to him to establish that fact by other evidence, for instance, by the production of the allocatur given after taxation.

Hambleton v. *Brown*, (1917) 2 K.B. 93, distinguished.

V. N. Jagannatha Rao for Plaintiffs.

E. R. Krishnan and *T. A. Ramaswami Reddi* for Defendants.

The Court delivered the following

JUDGMENT.—This is a reference by the learned Master and it raises an interesting question regarding the position of a decree-holder who has had the costs awarded to him taxed by the proper officer, but has failed to have the taxed costs entered in the margin of the decree as required by the rules of the Original Side of this Court.

To appreciate the question that arises for determination, it is necessary to set forth the facts briefly. The petitioner in this Execution Application is the decree-holder in Small Cause Suit No. 3820 of 1942 on the file of the Presidency Court of Small Causes, Madras. He obtained a decree for Rs. 378 odd and costs on 25th November, 1942. The judgment-debtor in that suit happened to be the first plaintiff in Civil Suit No. 37 of 1937 on the file of this Court. In clause 5 of the decree of this Court in that suit there was a direction regarding costs which was worded as follows :—

"That defendants 1 to 4 do from and out of the said funds in their hands mentioned in clause 4 *supra* pay to the present next friend of plaintiff 2 the costs of the said plaintiff 2 of the suit *when taxed and noted in the margin hereof* with interest thereon".

The next friend of the second plaintiff referred to here was the first plaintiff who was granted a decree for costs. All the four defendants died after the suit. Defendants 1 and 2 were the trustees of a temple in Coonoor. The present trustee who succeeded the first defendant has been brought on record and he is the respondent in this application. He is represented by Mr. T. A. Ramaswami Reddi who opposes the application.

The petitioner who is the decree-holder in the suit in the Court of Small Causes, attached the costs awarded to his judgment-debtor who, as already stated, was the first plaintiff in Civil Suit No. 37 of 1937 and it was in prosecution of that proceeding that the present execution application was filed in this Court. When he sought to enforce execution, it was discovered that the first plaintiff in Civil Suit No. 37 of 1937 had, after the decree in that suit, got the costs awarded to him by clause 5 of the decree taxed by the Taxing Officer, but he had failed to get the taxed costs entered in the margin of the decree. When this was discovered, the present petitioner filed an application for excusing the delay in having this entry made, the time for doing which under Order XVII, rule 7 of the Original Side Rules is three months. The application was very belated, because it was presented nearly three years after the date of the decree. The Master refused to excuse the delay and dismissed the application. That order has now become final, because no appeal has been preferred on behalf of the petitioner from the decision of the Master.

It is now contended on behalf of the petitioner that, under the decree in Civil Suit No. 37 of 1937, the amount of the costs awarded to the first plaintiff became ascertained when they were taxed. Therefore it is argued that since taxation of costs took place long prior to the attachment effected at the instance of the present petitioner, he must be permitted to prosecute his execution application. It is admitted that the taxed costs have not been entered in the margin of the decree. This, according to the petitioner's learned counsel, is an omission that cannot

be fatal to his execution petition. His argument is that it is the decree that awarded the costs. On the date of the decree the costs were not ascertained. When costs were taxed, they became ascertained and then they became capable of attachment. According to the learned counsel, the rule contained in Order XVII, rule 7, requiring insertion of the amount of costs in the margin of the decree prescribes an administrative act to be done by the officers of this Court. He argues that it is not a rule which confers any right. The right, according to him, was conferred by the judgment and the decree and, if there has been an omission to get the proper officer of this Court to do the administrative act of entering the amount of taxed costs in the margin of the decree, such omission would not deprive him of his remedy to claim the costs. Entry of the taxed costs in the margin of the decree, according to the petitioner's learned counsel, furnishes proof or evidence of the amount awarded as costs by the decree. It is not the only proof or the only evidence for establishing the fact. He therefore contends that he may prove the right by other equally effective evidence, *viz.*, by producing copies of the judgment and decree and by producing the allocatur given after taxation. In support of this contention, reliance is placed upon the judgment of Atkin, J., as he then was, which is reported as *Hambleton* v. *Brown*[1]. It must be stated before referring to the observation of the learned Judge that, according to the provisions of Order XLI of the Rules of the Supreme Court in England, every judgment has to be entered by the proper officer of the Court in the book kept for the purpose and the entry, unless the Court or judge shall otherwise direct, shall be dated as of the day on which the judgment was pronounced. The forms of the judgment are given in Appendix F to the Rules of the Supreme Court (page 1700 of the Annual Practice for 1943). To take as example Form No. 1 in the Appendix, the entry contains the clause :

> "It is this day adjudged that the plaintiff recover against the said defendant £ and £ costs (or costs to be taxed)."

That is followed by a separate paragraph :

> "The above costs have been taxed and allowed at £ as appears by a Taxing Officer's certificate dated day of 19 ."

There will be necessity to fill the blanks in the second paragraph only if the amount of the costs is not fixed in the judgment but is directed to be taxed by the proper officer. The question that arose in the case relied upon by the learned counsel was whether omission to fill in the blanks in the second paragraph read above will in any way affect the right of the decree-holder to assign the total amount of the decree, including costs. The view taken by the learned Judge was that the entry in the second paragraph of the judgment of the exact amount of the taxed costs can only be regarded as a piece of evidence to show what the costs as taxed amounted to, in other words, that it would be open to the plaintiff who has obtained a decree for costs to prove the actual amount of the costs that he is entitled to by other evidence as well and not necessarily by production of the copy of the judgment in which the entry has been made of the total amount of costs. In the course of the judgment, the learned Judge says as follows :

> "The obligation to pay arose entirely from the judgment, and until that was effective there was only an expectancy of future property. It appears to me that the true view is that in a judgment for costs there is an actual judgment giving rights to the successful party as soon as pronounced. It is adjudged that the party recover costs to be taxed. The amount to be recovered has to be ascertained in a prescribed manner by taxation and, when the taxing Master has ascertained the amount and so certified, nothing further remains to be done but the ministerial act of completing the record."

The reference to the ministerial act is obviously to the filling in of the blanks in the second paragraph of the form of the judgment already referred to.

The question for consideration is whether the view expressed by Lord Atkin can be made applicable to a case like the present. It seems to me that the circumstances are entirely different in the case of a decree drawn up on the Original Side of this Court. The rule regarding the wording of the decree—and it must

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1. (1917) 2 K.B. 93.

be remembered that it is the decree and not the judgment that is capable of execution—is rule 7 in Order XVII of the Original Side Rules. The whole of it may be read :

> "If costs (other than fixed costs) are awarded, and unless otherwise ordered by the Court, the award of the costs of the suit or order, as the case may be, shall be inserted in the decree or order, followed by the words 'when taxed and noted in the margin hereof;' and the Registrar shall, upon production of the allocatur of the Taxing Officer, insert, the amount of costs accordingly (which shall bear interest at the rate of 6 per centum per annum from the date of taxation until payment). Provided always that no costs shall be noted after three months from the date of the taxation of the decree or order without the order of the Court, to be obtained upon summons in Chambers, and after notice to the other side."

In the present case, there was no special direction asked for or granted by the Court when Civil Suit No. 37 of 1937 was decreed. As a consequence, the words "when taxed and noted in the margin hereof" were inserted in clause 5 of the decree which is the relevant clause. The wording of this clause leaves no room for doubt that, under the decree, the obligation to pay the costs can arise only when a condition is fulfilled, and that the condition according to the decree is that the costs of the party should be taxed and noted in the margin of the decree. According to Order XVII, rule 7, it would have been open to the party concerned to have asked the Court when judgment was pronounced for a special direction, in the absence of which, according to the rule, the decree shall contain this condition. Since the decree is worded in this manner, it is futile for the applicant to contend that it must be construed ignoring the condition altogether. The words "when taxed and noted in the margin," in view of the wording of clause 5 of the decree, cannot be regarded as mere superfluity. If these words are understood in their natural sense, and there is no reason why they should not, then it would not be open to the petitioner to say that the entry in the margin of the decree of the taxed costs is only one of several methods of proving what the amount of the costs is and that it would be open to him to establish that fact by other evidence. So long as this part of the decree is not amended, it would not be possible to hold in favour of the applicant's learned Advocate's contention. Moreover, upholding that contention would result in repealing rule 7 of Order XVII.

The reference made by the Master is answered in these terms.

K.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

K. Kandaswami and another .. *Appellants**

v.

K. K. Neelamagam Pillai .. *Respondent.*

Madras House Rent Control Order (1941), *section* 7-*A* (2-*A*)—*Words "as if it were a decree of his Court"*—*Effect*—*Order passed in execution*—*Appealability*—*Civil Procedure Code* (*V of* 1908), *section* 47—*Applicability.*

The words "as if it were a decree of his Court" in section 7-A (2-A) of the Madras House Rent Control Order has the effect of rendering the order of the Rent Controller a decree of the particular Court for the purpose of execution, and as the provisions of section 47 of the Civil Procedure Code become applicable to the case the parties have a right of appeal from orders of the executing Court, although the order of the Rent Controller himself directing eviction is final and cannot be challenged in the Civil Court.

Appeal against the order of the District Court of West Tanjore, dated 9th March, 1946 and made in A.S. No. 49 of 1946, preferred against the order of the Court of the Subordinate Judge of Kumbakonam in E.P. No. 115 of 1945 in R.C.A. No. 193 of 1945 on the file of the Rent Controller, Kumbakonam.

K. S. Champakesa Aiyangar and *K. C. Srinivasan* for Appellants.

M. Ranganatha Sastri for Respondent.

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* A. A. A. O. No. 92 of 1946. 2nd August, 1946.

The Court delivered the following

JUDGMENT.—The Rent Controller, Kumbakonam, made an order for delivery of a house to the petitioner. The order is in these terms :

"The petitioner and 1st respondent are present. The 1st respondent agrees to put the petitioner in possession of the property on 11th December, 1945. The petitioner agrees to this proposal. It is ordered accordingly."

Possession of the house was not delivered as per the order and the petitioner sought execution of it in the Court of the Subordinate Judge of Kumbakonam not only against the 1st respondent, Muthuswami Thevar, but also against respondents 2 and 3, K. Kandaswami and K. Kamalambal Ammal, the second respondent being the brother-in-law of the first respondent and the third respondent being the second respondent's wife. They were party-respondents to the application for eviction before the Rent Controller. It is pointed out by the learned Subordinate Judge that the second respondent agreed to the eviction order and that the third respondent had no rights independently of her husband. Their objections to delivery of the house were overruled and possession was ordered to be delivered by a particular date. Respondents 2 and 3 to the original petition thereupon preferred an appeal to the District Judge of West Tanjore. A preliminary objection was taken to this appeal by the original petitioner to the effect that no appeal lay from an order in execution by the Subordinate Judge. This preliminary objection was upheld by the learned District Judge and the appeal was dismissed with costs. Respondents 2 and 3 to the original petition, who were the appellants before the lower Court, have now preferred this Civil Miscellaneous Second Appeal and it is urged on their behalf that the view taken by the learned District Judge is wrong and that once the order of the Rent Controller is sought to be executed before the Subordinate Judge " as if it were a decree of his Court ", as provided in section 7-A (2-A) of the Madras House Rent Control Order, section 47 of the Civil Procedure Code becomes applicable and the parties are entitled to an appeal. The contention on their behalf is that the Rent Control Order itself provides that it is to be executed as if it were a decree passed by the Subordinate Judge's Court, and that the orders of the executing Court are subject to the appeals provided in the Code, though finality attaches to the order of the Rent Controller, in so far as eviction is directed.

The ground on which the learned District Judge held that no appeal lay to him is that no right of appeal is expressly conferred under the Madras House Rent Control Order, which provides that the order made by the Rent Controller is final. He read the words " as if it were a decree passed by him " to mean executable in a like manner as if it was a decree of a Court and not as investing the Court with the jurisdiction of an executing Court and the attendant consequences of an appeal from an order in execution.

It is true that a right of appeal must be given by an express enactment. But if by virtue of a special enactment, an order of a particular tribunal is to be treated as an order of a regular court for certain purposes, then the right of appeal is attracted under the general law. The learned District Judge relied on the Full Bench decision in *Nagappa* v. *Annapurani*[1], as an authority supporting his view. Really it does not ; for we find at page 274 observations to the effect that proceedings under section 19 of the Madras Agriculturists' Relief Act are not in the nature of proceedings in execution and hence section 47 of the Civil Procedure Code has no application. If however they are to be treated as proceedings in execution, it is reasonably clear that section 47 will apply. The order of the Rent Controller has to be executed by the principal Subordinate Judge as if it were a decree of his Court and this means that for purposes of execution it should be regarded as a decree of the Subordinate Judge. Once we reach this position it is difficult, if not impossible, to resist the applicability of section 47 of the Code. Only a few decisions need be referred to as justifying the view that an appeal lies. To

1. (1941) 1 M.L.J. 164 : I.L.R. 1941 Mad. 261 (F.B.).

start with, there is the leading case of *National Telephone Company Ltd.* v. *Postmaster General*[1]. Viscount Haldane L.C. says at page 552 :

"When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches."

Lord Parker observes at page 562 :

"Where by statute matters are referred to the determination of a Court of record with no further provision the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision remain the same."

The decision in *Secretary of State for India* v. *Chelikani Rama Rao*[2] explains away the prior decision of the Board in *Rangoon Botatoung Company Limited* v. *The Collector, Rangoon*[3], as based upon the fact that the proceedings were from the beginning to end ostensibly and actually arbitration proceedings. Lord Shaw says :

"The claim was the assertion of a legal right to possession of and property in land ; and if the ordinary courts of the country are seized of a dispute of that character it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation;"

and the Board overruled the objection that no appeal lay. This decision is followed in *Maung Ba Thaw* v. *Ma Pin*[4], where it was laid down that where a Court is appealed to as one of the ordinary Courts of the country, the ordinary rules of the Code of Civil Procedure apply. To the same effect more or less are the observations of the Privy Council in *Hem Singh* v. *Mahant Basant Das*[5]. The case was under the Sikh Gurudwaras Act. There too the original tribunal from which an appeal was provided to the High Court was not a Court within the Civil Procedure Code, but was an *ad hoc* tribunal.

The cases relied on by the respondent in *Chinnasami Mudali* v. *Tirumalai Pillai and the Right Honourable the Secretary of State for India*[6], *Kadir Mohidin Marakayar* v. *Muthukrishna Aiyar*[7] and *Ibrahim Khan Sahib* v. *Rangasami Naicken*[8] have really no bearing on the point now in dispute. The question really is not so much the conferring of a right of appeal as including within the jurisdiction of the particular Court mentioned a new subject matter. To quote the words of Lord Atkinson in the *National Telephone Company, Limited* v. *Postmaster-General*[1],

"It is not, in substance, in my view, at all a question of giving a right of appeal by implication. It is simply the question of extending the jurisdiction of an existing Court of law, with all its incidents including a right of appeal, to a new matter closely resembling in character those matters over which it has already jurisdiction as a Court of law."

The words of the Madras Rent Control Order are clear and make an order of the Rent Controller a decree of a particular Court for the purpose of execution and in my opinion section 47 clearly applies conferring on the parties a right of appeal from orders of the executing Court, though the order of the Rent Controller himself directing eviction is final and cannot be challenged in Civil Court.

The order of the lower Court is set aside and the appeal remanded for fresh disposal according to law. The respondent will pay the appellants' costs of this appeal. The costs of the lower Court will abide the ultimate result.

B.V.V. *Appeal allowed.*

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1. (1913) A.C. 546.
2. (1916) 31 M.L.J. 324 : L.R. 43 I.A. 192 : I.L.R. 39 Mad. 617 (P.C.).
3. (1912) 23 M.L.J. 276 : L.R. 39 I.A. 197 : I.L.R. 40 Cal. 21 (P.C.).
4. (1934) 66 M.L.J. 404 : L.R. 61 I.A. 158 : I.L.R. 12 Rang 194 (P.C.).
5. (1936) L.R. 63 I.A. 180 : I.L.R. 17 Lah. 146 (P.C.).
6. (1901) I.L.R. 25 Mad. 572.
7. (1902) 12 M.L.J. 368 : I.L.R. 26 Mad. 230.
8. (1905) I.L.R. 28 Mad. 420.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUPPUSWAMI AYYAR.

S.K. Kadirvelsami Naicker by his authorised agent, C. Chockalingam Pillai .. *Appellant**

v.

S.P. Sultan Ahmed Badruddin Rowther (died) and others .. *Respondents.*

Madras Estates Land Act (I of 1908). sections 3 (1), 77 and 189—"Agriculture"—If includes cardamom cultivation—Lease of forest land in Zamindari for cardamom cultivation—Suit for rent—Jurisdiction of Civil Court to entertain—Lease lands comprising also pannai *lands—Dismissal of suit in its entirety—Propriety.*

The word 'agriculture' implies something which is achieved with the aid of human agency. The growing of cardamoms does come within the ordinary meaning of the word 'agriculture' and even if it does not, it certainly comes within the meaning of that word as used in the Madras Estates Land Act, because there agriculture expressly includes horticulture which embraces the growing of fruits and cardamoms are only the seeds of the fruit of the cardamom plant.

In a suit to recover rent under a lease of 475 acres of forest land within a Zamindari let for purposes of cardamom cultivation, the defendants took exception to the jurisdiction of the Civil Court on the ground that they were entitled to permanent rights of occupancy in the land and that therefore the Revenue Court alone had jurisdiction. On the contentions that the cultivation in question was not 'agriculture' as defined in the Madras Estates Land Act and that in any event as regards an extent 125 acres of *pannai* lands comprised in the lease, the suit could be decreed,

Held, that as cardamom cultivation was 'agriculture' within the meaning of the definition in the Madras Estates Land Act, the defendants have a right of permanent occupancy in respect of the area covered by the lease excluding the *pannai* lands and the remedy of the landholder was in the Revenue Court and not the Civil Court. But as 125 acres of the area was *pannai* lands it was not proper to dismiss the suit in its entirety. The apportionment of rent is a very easy matter and the dismissal of the suit in regard to the *pannai* lands could only mean delay, further expense and waste of judicial time and hence the suit should be decreed in regard to the rent due in respect of those lands.

Appeal against the decree of the Court of Subordinate Judge, Dindigul dated 24th August, 1944 in O.S. No. 17 of 1943.

Sir Alladi Krishnaswami Aiyar, T. M. Ramaswami Aiyar and *K. Subrahmanyam* for Appellant.

S. K. Ahmed Meeran, T. P. Gopalakrishna Aiyar and *U. S. Ramaswami Aiyar* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is the zamindar of Yerasackanaickanoor. He brought the suit which has given rise to this appeal in the Court of the Subordinate Judge of Dindigul to recover from the respondents the amount of Rs. 10,637-6-3, which he claimed to be due to him by way of rent under a lease dated the 16th December, 1930. The lease was granted by the plaintiff's predecessor-in-title for the purpose of cardamom cultivation. It was for a period of fifteen years and covered 475 acres of forest land, all of which fell within the boundaries of the zamindary. The defendants took exception to the jurisdiction of the Court. They claimed that they were entitled to permanent rights of occupancy in respect of the whole area covered by the lease and consequently the Revenue Court alone had jurisdiction. The plaintiff maintained that he was entitled to sue in the Civil Court because cardamom cultivation was not agriculture within the meaning of the Madras Estates Land Act. He also said that 125 acres were *pannai* lands, which meant that in any event he had the right to sue in the Civil Court to recover a proportionate amount of the arrears of rent. The learned Subordinate Judge held that cardamom cultivation was agriculture within the definition given in the statute, but he allowed the plaintiff's claim that 125 acres of the 475 acres represented *pannai* lands. Therefore the suit lay in the Subordi-

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* Appeal No. 9 of 1945. 20th August, 1946.

nate Court to recover a proportionate amount of the arrears, but the Subordinate Judge dismissed it in its entirety on the ground that the plaintiff had not attempted to differentiate between the *pannai* lands and the other lands in his plaint. He did recognise that the plaintiff was entitled to sue in the Civil Court in respect of the *pannai* lands, but he thought that in the circumstances, the plaintiff should be relegated to a separate suit.

The plaintiff has appealed. In the first place he says that the Subordinate Judge erred in holding that the cardamom cultivation is agriculture within the meaning of the Madras Estates Land Act and in the second place he says that he should have been given a decree for the arrears of rent due in respect of the 125 acres of *pannai* lands. Both sides have accepted the finding that 125 of the 475 acres represent *pannai* lands.

Section 3 (1) of the Madras Estates Land Act defines "agriculture" as follows: "Agriculture with its grammatical variations and cognate expressions shall include horticulture." The Oxford Dictionary's definition is: "the science and art of cultivating the soil, including the allied pursuits of gathering in the crops and rearing live-stock, tillage, husbandry, farming (in the widest sense)." The dictionary definition may be too widely drawn to apply in its entirety to the Madras Estates Land Act. For instance, land let for the rearing of live-stock may not come within the definition, although we do not propose to express a definite opinion on the point. But what is clear is that the word "agriculture" implies something which is achieved with the aid of human agency, as was pointed out by this Court in the *Yuvarajah of Pithapuram* v. *Commissioner of Income-tax, Madras*[1]. Cardamom cultivation requires the aid of human agency. Sir Alladi Krishnaswami Aiyar, on behalf of the appellant, has agreed that cardamom cultivation involves three stages. In the first place, the seeds are sown in beds where they germinate and are left to grow for six months. Then they are transplanted into another bed where they are left to grow for a further six months. This is the second stage. The third stage is the replanting of the young plants in the forests. They are permanently planted there as cardamom cultivation demands a considerable amount of shade. Therefore, the human element plays an important part in the bringing of cardamom plants to fruition..

In support of his argument that cardamom cultivation is not agriculture, Sir Alladi Krishnaswami Aiyar has laid stress on the decision of this Court in *Chandrasekhara Bharathi Swamigal* v. *Doraiswami Naidu*[2], and the judgment of the Privy Council in *Kesho Prasad Singh* v. *Sheo Pragash Ojha*[3].

In the first of these cases the question was whether the growing of casuarina trees for fuel by a ryot on land forming part of an estate within the meaning of the Madras Estates Land Act, was agriculture. The learned Judges (Reilly and Ananthakrishna Aiyar, JJ.) held that it was not, but admittedly their judgment is in conflict with the opinion expressed by Spencer and Ramesam, JJ. in *Panadai Pathan* v. *Ramaswami Chetti*[4]. There is a vast difference between the cultivation of cardamoms which are grown for human consumption and the growing of casuarina trees for fuel. If the judgment in *Chandrasekhara Bharathi Swamigal* v. *Duraiswami Naidu*[2], were in point, we should feel compelled to refer this case to a Full Bench in view of its conflict with the judgment in *Panadai Pathan* v. *Ramaswami Chetti*[4] but it is manifest that the decision in *Chandrasekhara Bharathi Swamigal* v. *Duraiswami Naidu*[2], has no bearing here.

The decision of the Privy Council in *Kesho Prasad Singh* v. *Sheo Pragash Ojha*[3], provides no greater help for the appellant. In that case the question was whether the planting of a mango grove was agriculture within the meaning of section 79 of the Agra Tenancy Act, 1901. The Judicial Committee held that it was not, but the definition of agriculture in the Agra Tenancy Act and the definition of

1. (1946) 1 M.L.J. 120.
2. (1931) 61 M.L.J. 648: I.L.R. 54 Mad. 900.
3. (1924) 47 M.L.J. 824: L.R. 51 I.A. 381: I.L.R. 46 All. 831 (P.C.).
4. (1922) 43 M.L.J. 191: I.L.R. 45 Mad. 710.

the term in the Madras Estates Land Act are not the same. In the Madras Estates Land Act, agriculture includes horticulture, but horticulture is not included in the definition of agriculture in the Agra Tenancy Act. We may here mention that this Court in *Sarojini Devi* v. *Sri Krishna Anjaneya Subramaniam*[1], held that a mango grove was agricultural land within the meaning of the Hindu Women's Rights to Property Act.

In *Kaju Mal* v. *Saligram*[2], the Privy Council held that the words "agricultural purposes" in section 2 (3) of the Punjab Alienation of Land Act of 1900 include the cultivation of tea. Now if the cultivation of tea is agriculture it is very difficult to see why the cultivation of cardamoms should not be agriculture, especially as in the Madras Estates Land Act, agriculture includes horticulture which embraces the growing of fruits. Cardamoms are the seeds of the fruit of the cardamom plant. Therefore, if the growing of cardamoms does not come within the ordinary meaning of the word "agriculture"—we are of opinion that it does—it certainly comes within the meaning of the word as used in the Madras Estates Land Act, because there agriculture expressly includes horticulture. For these reasons, we agree with the Subordinate Judge that the defendants have a right of permanent occupancy of the area covered by the lease, excluding the 125 acres of *pannai* lands, and therefore the landholder's remedy in respect of the balance of 350 acres is in the Revenue Court and not in the Civil Court.

We disagree with the Subordinate Judge in his dismissal of the suit in so far as the 125 acres of *pannai* lands are concerned. The apportionment of the rent is a very easy matter and the dismissal of the suit with regard to the *pannai* lands can only mean delay, further expense and waste of judicial time. The Court is informed by learned Counsel that in the trial Court the defendants were agreeable to a decree being passed against them for the amount of arrears of rent due by them in respect of the *pannai* lands. Both sides are now agreed that the plaintiff is entitled to a decree for Rs. 2,431-3-0 in respect of the *pannai* lands and the appeal will be allowed to this extent. The plaintiff will have interest at the Court rate from the date of the plaint to the date of decree on the Rs. 2,431-3-0 and further interest on the decretal amount from the date of decree until payment or realisation. He will have costs here and below on the decretal amount, but he will pay costs in both the Courts on his claim in respect of the 350 acres, namely, Rs. 8,206-3-3.

The defendants paid an advance of Rs. 4,500. We have not taken this into account in arriving at the figure of Rs. 2,431-3-0. The adjudgment will be made when the occasion is fitting.

V.S. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

V. T. Elaya Pillai .. *Petitioner**

v.

Ramasami Jadaya Goundan .. *Respondent.*

Plaint—Amendment—Suit by holder of impartible estate for declaration that a promissory note and a lease deed executed by him were not binding on him—Execution pleaded to be vitiated by coercion, fraud and undue influence—Death of plaintiff and bringing on record of successor in interest as his legal representative—Amendment of plaint raising contention that those documents are not binding on the estate—If can be allowed—Change of cause of action—Holder of impartible estate if can sue for declaration that alienation by him is not binding on the estate.

A suit was filed by the holder of an impartible estate for a declaration that a promissory note and lease deed executed by him were not binding on him on the ground that the execution of the documents was vitiated by coercion, undue influence and fraud. The plaintiff died *pendente lite*

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1. (1944) 1 M.L.J. 361 : 1944 F.L.J. 146.
2. (1923) 46 M.L.J. 536 : L.R. 51 I.A. 11 ; I.L.R. 5 Lah. 50 (P.C.).

* C. R. P. No. 28 of 1946. 26th April, 1946.

and his younger brother was brought on record as his legal representative and successor to the impartible estate and he sought to amend the plaint by raising a contention that the documents were not binding on the estate as it was not competent to his predecessor, who was only a qualified owner, to alienate it beyond his lifetime in the absence of necessity.

On the question whether the amendment could be allowed,

Held, that as it was not open to the original plaintiff to have raised the plea now sought to be raised by the amendment, and further, even if it were permissible for the original plaintiff to have raised this plea in the plaint itself, the Court ought not to allow him at a subsequent stage to have the plaint amended by the addition of a new plea based upon a cause of action different from that on which the suit was originally laid, it would not be open to his successor to put forward a claim which was not available to his predecessor. The result of allowing such an amendment would be to introduce a completely new element unconnected with and in essence even inconsistent with the grounds originally alleged in support of the plaintiff's claim and it would not be proper to permit the amendment.

Venkatarama Rao v. *Venkatalingam Nayanim Bahadur Varu*, (1921) 42 M.L.J. 43 and *Shaw Mya* v. *Maung Mo Hnaung*, (1921) L.R. 48 I.A. 214 : I.L.R. 48 Cal. 832 (P.C.), referred to.

Raja Ramachandra Sarn Harischandra Deo Garu v. *Akella Venkatalakshminarayana*, (1918) 37 M.L.J. 65, explained.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, South Arcot at Cuddalore dated 12th December, 1945, in I. A. No. 169 of 1945 in O. S. No. 44 of 1944.

K. S. Sanakara Aiyar for Petitioner.

The Advocate-General (*K. Rajah Aiyar*) and *K. Srinivasan* for Respondent.

The Court delivered the following

JUDGMENT.—The first defendant in O. S. No. 44 of 1944 in the District Court of South Arcot seeks to revise an order of the learned District Judge of South Arcot allowing an application for amendment (I. A. No. 169 of 1945) made by the respondent. The suit was not originally filed by the respondent but was filed by one Muthuswami Jadayya Koundar who was the holder of an impartible estate known as Jadaya Goundan Hills Jagir. The suit was *inter alia* for a declaration that a promissory note bearing date 11th September, 1942, and a lease deed bearing date 16th September, 1942, obtained by the defendant from the plaintiff are not binding on or enforceable against the plaintiff. The ground on which this relief was sought was that the execution of the promissory note and the deed of lease was vitiated by coercion, undue influence and fraud. The original plaintiff died on 13th May, 1945, and the present respondent, one Ramaswami, his younger brother, was brought on record as his legal representative and successor to the impartible estate. The respondent now seeks to amend the plaint filed by his predecessor by the addition of a paragraph which raises a contention that the promissory note and the lease deed are not binding on the estate as it was not competent to his predecessor, who was only a qualified owner, to alienate it beyond his lifetime in the absence of necessity. This plea is based evidently on section 4 of the Madras Impartible Estates Act. There is a reference in the paragraph sought to be added to section 6, of Madras Act II of 1904 but the other allegations in the paragraph do not justify a reference to that section. The application for amendment was opposed by the first defendant, his main objection being that the respondent ought not to be allowed to put forward a claim which was not available to the deceased. This was not seriously disputed before the learned District Judge, nor has it been disputed before me. The learned District Judge held that the original plaintiff, Muthuswami could have asked for a declaration that the alienation was not binding beyond his lifetime and that therefore the respondent could be allowed to obtain an amendment which sought to raise such a plea.

Mr. K. S. Sankara Aiyar, the learned Advocate for the petitioner before me formulated his objection to the amendment sought from two aspects : (1) he contended that it would not have been open to Muthuswami, the respondent's predecessor, to have raised the plea now sought to be raised by amendment, and (2) even if it were permissible for Muthuswami to have raised that plea originally at the time of the filing of the plaint the Court ought not to allow him at a subsequent stage to have the plaint amended by the addition of this plea based upon a cause of action different from that on which the suit was originally laid.

I agree with him and I am of opinion that both his grounds of objection are well founded. So far as I am aware the only observations directly in point on the question whether the holder of an impartible estate was entitled to institute a suit for a declaration that an alienation made by him was not binding on his successor are to be found in the decision in *Venkatarama Rao* v. *Venkatalingama Nayanim Bahadur Varu*[1]. I may mention that that decision is also most apposite to the present case. In that case a suit was filed by the Rajah of Kalahasti on a mortgage executed by him. The plaintiff died pending suit and a successor to the zamindari was brought on record as the third plaintiff. He applied to amend the plaint by adding an allegation that the transaction set out in the plaint even if true would not bind him as successor to the estate as the moneys raised thereunder were not utilised for purposes binding on the estate. The lower Court allowed the amendment to be made. On an application for revision Kumaraswami Sastri, J., set aside the order of the lower Court on the ground that the respondent in that case as legal representative could not set up a plea that he was not bound by the transactions of the deceased plaintiff. The learned Judge said :

> "In cases where there is a conflict of interests between the deceased plaintiff and his legal representative and where the latter claims that he is not bound by the transactions of the deceased plaintiff, I think the proper course is for the legal representative to file a separate suit to enforce his rights, and that it is not open to the legal representative in his capacity, as such, to repudiate the transactions, which have been admitted by the deceased to be valid and on the footing of the validity of which the deceased claimed certain reliefs in the plaint . . . . But where the amendment sought is one which the deceased himself could not have asked, it seems to me difficult to see how his legal representative could ask for it."

It therefore became necessary for the learned Judge to determine whether it was open to the holder of an impartible estate to question the propriety of his own alienation or to seek a declaration that the alienation made by him was not binding on his successor. The opinion of the learned Judge on this point is expressed in unambiguous terms thus :

> "It is clear that in the present case it was not open to the deceased zamindar to question the propriety of his own alienation or to seek a declaration that the alienations made by him and which in terms are not limited to his own life interest in the zamindari are not binding on his successors."

On the authority of this case there can be no question that the amendment allowed by the lower Court was wrong. The learned Advocate-General however maintained that the holder of an impartible estate can on grounds of public policy be allowed to bring a suit for a declaration that an alienation made by him is not binding on his successors. For this position he relied on the decision in *Raja Ramachandra Saru Harischandra Deo Garu* v. *Akella Venkatalakshminarayana*[2]. Having regard to the facts of that case, I am of opinion that it was not decided by the learned Judges in that case that the holder of an impartible estate was entitled to obtain from the Court a declaration that the alienation which he had made would not bind his successors. In that case the suit was brought on a mortgage of an impartible estate which was executed by the first defendant, the then proprietor. The prospective successor to the estate was also joined as the second defendant. It does not appear from the facts set out in the opening of the judgment whether the first defendant definitely alleged that there was no necessity for the mortgage. The second defendant, however, did allege that there was no necessity for the mortgage and that it did not bind the estate. The suit was however compromised, the razinamah being to the effect that the first defendant should pay the sum agreed upon in certain instalments, that the debt was binding on the estate and that on failure of payment, the mortgaged property would be sold. There was default in payment and the plaintiff made an application for a final decree and for sale of the mortgaged property. Both the first defendant and the second defendant by their counter-petitions preferred objections mainly on the ground that the estate was an impartible and inalienable estate and that it could not be sold in pursuance of the compromise decree. The second defendant urged a further ground that

1. (1921) 42 M.L.J. 43. 2. (1918) 37 M.L.J. 65.

the first defendant had no necessity to borrow the amount for which the mortgage was executed. The learned District Judge overruled the objections and passed a final decree. There was an appeal to this Court. The first defendant died pending the appeal. Abdur Rahim, J., who delivered the leading judgment therefore defined the scope of the controversy before this Court thus :

> "As already stated, the first defendant has since died and the only question now is whether by reason of the statements in the petition of compromise and the decree passed in accordance therewith the second defendant is precluded from raising the question as to the binding character of the debt or whether the question should be tried."

Several contentions were raised to preclude the second defendant from raising such a plea. One of such contentions was that the first defendant, the then holder was a party to a consent decree and it must be held that by reason of the compromise the debt must be deemed to have been incurred for a proper purpose. The learned Judge at page 69 of the report says dealing with this contention,

> "As regards the last, it should be pointed out that in his written statement the first defendant questioned the validity of the mortgage, and the statements in the razinamah petition as to the character of the debt can at the most be treated as evidence against the first defendant. It is difficult to see how it estops him from asking for an enquiry on this issue. It is well known there is no estoppel against a statute."

The learned Advocate-General says that the observations made by the learned Judge in this connection deals with the right of the first defendant and not with the second defendant. Though I must confess that there is some ambiguity in the language, having regard to the statement of the case at the outset to which I have already referred and having regard to what follows which I shall presently refer to, the learned Judge throughout was only considering the case of the second defendant. Immediately following the passage which I have reproduced above the learned Judge deals with another contention raised as regards the second defendant, namely, that it was open to a mortgagee seeking to enforce a mortgage against an estate in the possession of a Hindu widow to implead the next reversioner in the suit so that a decree obtained in his presence would bind the estate, and on the same analogy the compromise decree could be held to bind the second defendant who was *eo nomine* on the record. Dealing with this contention the learned Judge says :

> "But I am not satisfied that the position of an owner of an impartible estate and of an heir to such an estate is analogous in all respects to that of a Hindu widow and the next reversioner . . . . . . An heir to an impartible estate has no sort of right in it for the time. His interest in the estate is a mere *spes successionis* and any attempt therefore by the first defendant to deal with his chance of succession must be held to be void."

Even the next contention that the compromise should be considered to be a family settlement has reference only to the second defendant. In these circumstances I am not inclined to agree with the learned Advocate-General that this decision is an authority for the position that it is open to the holder of an impartible estate to institute a suit for a declaration that an alienation made by him is not binding on his successors after his lifetime. Apart from this decision no other decision has been cited to me in support of this contention of the respondent.

The learned Advocate-General raised a contention that the original plaintiff could be deemed to have two capacities, one an individual capacity and another a representative capacity representing the estate for the time being and in his representative capacity he could file a suit for a declaration that the alienation was not binding on the estate after his lifetime. Though it is quite true that a person who happens to be the holder of an impartible estate may have other capacities and transactions in that capacity, so far as the provisions of the Madras Impartible Estates Act are concerned they have reference only to his transactions as the holder of an impartible estate and in respect of such an estate. I fail to see how there is a dual capacity in respect of the alienation of an impartible estate by the holder for the time being of that estate.

The decision in *Sundaresan Chettiar* v. *Viswanadha Pandara Sannadhi*[1], which is a case of public trust cannot obviously have any application to the facts of the present case.

1. (1922) 43 M.L.J. 147 : I.L.R. 45 Mad. 703.

The other contention of Mr. Sankara Aiyar is equally substantial. The suit as originally laid was on the specific ground that the transactions referred to, namely, the promissory note and the lease deed, were vitiated by undue influence and fraud. The cause of action has definite reference to the exercise of undue influence and coercion by the first defendant. Having instituted the suit to obtain a relief on those grounds I am of opinion that a Court should not permit the plaintiff to amend the plaint by the addition of a new plea based on quite a different ground, namely, that though the suit transactions were valid they would not be binding on the successors to the plaintiff or binding on the estate after the lifetime of the plaintiff. The result of allowing such an amendment would be to introduce a completely new element unconnected with and in essence even inconsistent with the grounds originally alleged in support of the plaintiff's claim. Authority is not needed that there are limits to the discretion of a Court when permitting an amendment to be made to the plaint. The leading judgment in *Ma Shwe Mya* v. *Maung Mo Hnaung*[1] enunciates in clear terms such limitation. I am therefore of opinion even assuming that the original plaintiff would have been entitled to institute a suit for a declaration that the suit transactions were not binding on his successors and on the estate after his lifetime, it is not proper to permit such a plea to be raised by way of amendment even if the amendment had been applied for by the original plaintiff himself.

For both these reasons I must hold that the learned District Judge was in error in granting the amendment. I set aside his order and dismiss I. A. No. 169 of 1945 with costs throughout.

V.P.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Bangaru Reddi .. *Appellant** (*1st Defendant*)

v.

Mangammal *alias* Jayalakshmi Ammal .. *Respondent* (*Plaintiff*).

Hindu Widows' Re-marriage Act (*XV of* 1856), *section* 2—*Scope and applicability—Forfeiture on re-marriage—If extends to property settled on widow absolutely in lieu of her claim for maintenance.*

Section 2 of the Hindu Widows' Re-marriage Act has no effect on property belonging to the widow absolutely on the date of the re-marriage. The words "as if she had then died" in the section supply the criterion for adjudicating on the rights and disabilities of the widow on re-marriage. All the results which would follow the re-marriage are results which would ensue if she had died on the date of the re-marriage. The rights and interests which she may have in her deceased husband's property by way of maintenance obviously refer to recurring rights as for example to payment of maintenance by the enforcement of a charge on her deceased husband's property. Where however in lieu of a widow's claim for maintenance property is settled on her by her husband's brother to be held by her absolutely with powers of alienation by way of gift, exchange, sale, etc., the estate which is conferred on her is absolute and not liable to forfeiture on her re-marriage.

Arunachalam Chetty v. *Seshiah Chetty*, (1938) 2 M.L.J. 701, relied on.

Debi Mangal Prasad Singh v. *Mahadeo Prasad Singh*, (1911) 22 M.L.J. 462 : L.R. 39 I.A. 121 : I.L.R. 34 All. 234 (P.C.) and *Mahomed Umar* v. *Man Kooer*, (1917) 40 I.C. 783, distinguished.

Appeal against the decree of the District Court of South Arcot in A. S. No. 156 of 1944, preferred against the decree of the Court of the District Munsiff of Villupuram in O. S. No. 148 of 1943.

Subramanyam, Rajagopal and *M. Kolandavelu Mudaliar* for Appellant.

T. E. Ramabhadrachariar for Respondent.

The Court delivered the following

JUDGMENT.—The short question for decision in this appeal is whether the respondent forfeits her right to property which she obtained under a deed of

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1. (1921) L.R. 48 I.A. 214 : I.L.R. 48 Cal. 832 (P.C.).

*S.A. No. 1258 of 1945. 13th September, 1946.

settlement Exhibit P-1 executed in her favour by the appellant on 7th June, 1938. The appellant Bangaru Reddi and one Sundara Reddi were undivided brothers. The plaintiff-respondent was married to Sundara Reddi in August, 1937. Unfortunately, Sundara Reddi died in April, 1938, leaving the plaintiff (still a minor) a widow. The deed in question was executed by the appellant in favour of the minor respondent represented by her guardian and father one Govinda Reddi. In September, 1941, the plaintiff married one Viswanatha Reddi. In December, 1941, the appellant issued a notice to her alleging that she had forfeited her right to the property settled on her on account of her re-marriage. The respondent was compelled to file the suit out of which this second appeal arises in respect of one of the items of property for a declaration that the property belongs to her and for possession free from the obstruction of the defendant. The learned District Munsiff dismissed the suit but on appeal the learned District Judge has granted a decree in her favour. The first defendant appeals.

The learned advocate for the appellant first contended that under section 2 of the Hindu Widows' Re-marriage Act (XV of 1856) the plaintiff forfeited her right to the property. Section 2 runs as follows :

"All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission, to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same."

It is clear that this section has no effect on property belonging to the widow absolutely on the date of the re-marriage. The rights and interests which she may have in her deceased husband's property by way of maintenance obviously refer to recurring rights as for example to payment of maintenance by the enforcement of a charge on her deceased husband's property. In the case of wills and other testamentary dispositions it is only the limited interest that ceases and determines. In my opinion the words, " as if she had then died " supply the criterion for adjudicating on the rights and disabilities of the widow on re-marriage. All the results which would follow the re-marriage are results which would ensue if she had died on the date of the re-marriage. In other words, if she had only a limited and life interest then that would cease ; but if she had an absolute estate that would not cease. In fact, the learned advocate for the appellant very properly did not lay such stress on this section in support of his case.

The next contention was that under the settlement deed the property must be deemed to have continued to form part of her husband's estate and the widow did not have a full and absolute estate, an estate which for example would be taken after her by her stridhana heirs.

Two decisions were relied on by him but before I deal with them it is necessary to refer to the relevant provisions of the deed itself. The document recites the marriage of the plaintiff and the death of her husband and the fact that she is entitled to get maintenance from the family of the settlor, and that it had been arranged by mediators that certain properties mentioned therein belonging to the executant should be settled on her. The document then goes on to say :

"You shall take these properties and enjoy them from this day onwards till you attain majority and shall after you attain majority hold and enjoy them absolutely with powers of alienation by way of gift, exchange, sale, etc. "

In the face of the language used in the operative portion of the document I think it will be extravagant to contend that an absolute estate was not conferred on the plaintiff under the document. There is no ground to restrict her power of alienation to occasions when she has a necessity which would justify an alienation by a limited owner. Nor is there a condition that the absolute title vested in her would be divested on the happening of any subsequent event like re-marriage.

It is clear that when property is conveyed absolutely to a widow by coparceners of her deceased husband in final quit and satisfaction of her claim to maintenance such a transaction would not be affected by her re-marriage. In *Arunachalam Chetty* v. *Seshiah Chetty*[1], it was held by Wadsworth, J., that when the coparceners of the husband of a Hindu widow settled with her guardian her claim to maintenance during all her lifetime at a fixed sum in satisfaction of which a promissory note was executed by them to the uncle as her guardian and the widow re-married subsequently, the widow did not forfeit her claims to the amount represented by the promissory note by virtue of section 2 of the Hindu Widows' Remarriage Act. The learned Judge says at page 703 :

"There is a completed contract whereby the coparceners of the deceased husband taking into consideration the uncertainty of the future claims which the widow might make, compounded for those claims by a fixed sum which was treated as having been paid by the substitution for the actual payment of a promissory note executed by the defendants to the uncle of the widow. When once this promissory note and this discharge document have been executed, the widow no longer has any interest in her husband's estate."

In the present case the conveyance of the two items of property under the settlement deed takes the place of the promissory note in that case.

The first decision relied on by the learned advocate for the appellant is reported in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh*[2]. Their Lordships of the Judicial Committee held that a mother in a joint Hindu family who is given a share of family property at a partition among the coparceners, does not get an absolute estate in such a share but it must be deemed to have been given to her for her life. The *ratio decidendi* of that case is to be found at page 242 where their Lordships point out that if the share is given to her as a substitute for that to which she would be entitled upon inheritance then she would not obtain an absolute estate. If, on the other hand, it was given to her by way of provision for her maintenance it is equally reasonable to hold that she only obtained a life estate. This decision has no bearing on the facts of the present case.

The next decision is that of the Calcutta High Court reported in *Mahomed Umar* v. *Man Koer*[3], in which the terms of an *ekrarnama* executed by and between three women who stood in the relation of two daughters-in-law and a daughter of the propositus were considered and on a construction of the document and the circumstances attendant on its execution it was held that the property which fell to the share of one of the widows under the document would be forfeited on her re-marriage. But the distinguishing feature of that case is that the document was executed by and between the persons who were not competent to confer on each other an absolute estate. None of the parties to that *ekrarnama* was an absolute owner. It follows, therefore, that viewed either as a provision for maintenance or as a convenient method of enjoying the share of the inheritance, the arrangement could not enlarge the limited nature of the estate to which the parties were entitled. In the present case, on the other hand, the executant was full owner of the properties and was entitled to confer an absolute estate on the respondent : and that was what he purported to convey under Ex. P-1.

In my opinion the learned District Judge was right in his conclusion and the second appeal is dismissed with costs.

(Leave is refused).

K.S. *Appeal dismissed.*

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1. (1938) 2 M.L.J. 701.
2. (1911) 22 M.L.J. 462 : L.R. 39 I.A. 121 : I.L.R. 34 All. 234 (P.C.).
3. (1917) 40 I.C. 783.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE GOVINDARAJACHARI.

Kota Navaneethammal and another .. *Appellants**

v.

Wupputur Kamalammal and others .. *Respondents.*

Hindu Law—Adoption—Vysias—Adoption of sister's son—Validity—Custom—Proof—Custom regarding sister's son as most suitable person to whom a father could give his daughter in marriage—If precludes adoption of sister's son.

The adoption of a sister's son is recognised by custom in the Vysia community. The rule of Hindu law which says that there can be no valid adoption unless a marriage were possible between the person for whom the adoption is made and the mother of the adopted boy in her maiden state, has been overridden by this custom and Vysia do adopt the sons of their sisters. The custom against the supposed rule based on the text relating to the reflection of a son is so widespread that very little evidence would turn the scale against the rule.

[In this case such custom was established by direct evidence.]

The practice of *Menarikam* (regarding the sister's son as the most suitable person to whom a father could give his daughter in marriage) is no longer insisted upon among Vysias and even if that custom still existed, it does not follow that a sister's son could not be adopted. It only means that if a sister's son were adopted, the adoptive father would be precluded from giving his own daughter in marriage to him.

On appeal from the judgment and decree of Kunhiraman, J., dated 14th September, 1945, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 159 of 1944.

T. V. Muthukrishna Aiyar and *P. Srinivasa Aiyangar* for Appellants.

K. Subba Rao, A. P. Sundarachari and *M. V. Nagaramayya* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—In a suit tried on the Original Side the appellants challenged the validity of the adoption of the second defendant by Lakshmana Perumal, the half-brother of the second defendant's mother. In the trial Court the factum of adoption was not disputed and in this Court it has been expressly admitted that the second defendant was adopted by Lakshmanaperumal on the 28th January, 1943. The adoptive father died on the 2nd April, 1944. The suit was filed on the 1st August, 1944, by Navaneethammal, the youngest half-sister of Lakshmanaperumal, and her son. Lakshmanaperumal had three half-sisters. The eldest, who is the sixth defendant, is the mother of the second defendant. The second is the seventh defendant, who supports the plaintiffs. The plaintiffs contended that the adoption was invalid because it offended against the rule of Hindu law which says that there can be no valid adoption unless a marriage were possible between the person for whom the adoption is made and the mother of the adopted boy in her maiden state. The rule only applies to the three regenerate classes, but as the parties to this suit are Vysias, they are within it. The plaintiffs also averred that there was a custom in the Vysia community prohibiting the adoption of a sister's son. The learned Judge found that there was no such custom, but he held that the contesting defendants had proved that there was a custom by which a Vysia could adopt a son of his sister and therefore the custom set at nought the rule of Hindu law on which the plaintiffs relied. In these circumstances he dismissed the suit. The plaintiffs have appealed.

In the Court below the plaintiffs laid some stress on a practice (referred to as *Menarikam*) which used to be followed in the Vysia community. It implied that a sister's son was regarded as the most suitable person to whom a father could give his daughter in marriage. Stress was laid on this custom because it was said that it in itself negatived the idea that a sister's son could be adopted. In this Court, Mr. Muthukrishna Aiyar, who has appeared in support of the appeal,

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*O.S.A. No. 58 of 1945. 7th August, 1946.

has very fairly conceded that *Menarikam* no longer exists as a custom. For twenty-five years and more the Vysia community has not insisted on the practice of a man giving his daughter in marriage to his sister's son. Even if *Menarikam* still existed, it does not follow that a sister's son could not be adopted. It only means that if a sister's son were adopted, the adoptive father would be precluded from giving his own daughter in marriage to him. But we do not need to dwell on this aspect of the matter because *Menarikam* is no longer insisted upon and there is abundant evidence on the record in proof of the custom that Vysias do adopt the sons of their sisters.

Twelve witnesses were called to prove the custom set up by the contesting defendants that Vysias do adopt the sons of their sisters. Most of the witnesses were people of standing and there was very little in the nature of real cross-examination. Mr. Venkataramayya (D. W. 4), an Advocate of this Court, deposed to the custom and he was not asked a single question in cross-examination. All the witnesses spoke to the existence of the custom and many of them gave instances where sisters' sons had in fact been adopted. The plaintiffs called six witnesses who gave evidence of a negative character, except one Bysani Krishnayya Chetty (P.W. 3) whose testimony renders support for the contesting defendants. He acknowledged that there was a custom in the Vysia community, of which he was a member, to adopt the sister's son. He denied, however, that it was customary to adopt a daughter's son. This latter statement cannot be treated seriously. If a sister's son can be adopted, there is no reason why a daughter's son should be in a different position. The learned Judge accepted the defendant's evidence in proof of the custom and we consider that he was fully justified in so doing. The volume of evidence in support of the adoption is considerable, and perhaps far more than was necessary. In delivering the judgment of the Division Bench which decided *Sooratha Singa* v. *Kanaka Singa*[1], where the question was whether an adoption of a brother's daughter's son was allowed by custom, Sadasiva Aiyar, J., said that by reason of an admission the burden of proving the adoption to be invalid was shifted on the shoulders of the other side; but even if this were not so, the custom against the supposed rule based on the text relating to the reflection of a son was widespread that very little evidence would turn the scale against the rule. In e earliest edition of Strange's Hindu Law, there is this statement—

"In practice, the adoption of a sister's son, by persons of all castes is not uncommon."

is statement was quoted with approval in the judgment of the Full Bench which 1885 decided *Vayidinada* v. *Appu*[2]. The statement in Strange in effect provides ortant corroboration of the oral testimony given in this case on behalf of the esting defendants.

We may add that it is common ground that the adoption of a sister's son is r nised by custom in the Brahmin and the Kshatriya communities. The q ion, so far as the Kshatriya community is concerned, was discussed in the j ent of this Court in the recent case of *Simhadri* v. *Satyanarayana*[3]. It was th expressly held that by reason of custom prevailing in this presidency an ac on by a Kshatriya whose gotra is the same as that of the natural mother of th pted boy is not unlawful and all the cases in which the rule had been ignored we viewed. It would indeed be strange if the Vysia community chose to follow th ient law prohibiting the adoption of the son of a woman whom the adoptive fat ould not have married in her maiden state when the Brahmin and the Ks ya communities have overridden the rule by custom; but the Court is not pelled to decide this case on the probability of the Vysia community having cho follow the Brahmin and the Kshatriya communities because there is dire l believable evidence that it has done so.

ppeal is dismissed with costs in favour of respondents 1 and 2.

Appeal dismissed.

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1. I.L.R. 43 Mad. 867.
2. I.L.R. 9 Mad. 44 (F.B.).
3. (1945) 2 M.L.J. 228 : I.L.R. 1946 Mad. 475.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

A. Samankatha Nadar .. *Appellant**

v.

Y. James .. *Respondent.*

Civil Procedure Code (V of 1908), Order 9, rule 9—Suit on behalf of minor dismissed for default by the gross negligence of the guardian—No application to set aside order of dismissal—Subsequent suit by minor on attaining majority—Maintainability—Limitation Act (IX of 1908), section 5 and Article 163—Applicability of section 5 to application to set aside order of dismissal for default.

It is a well-settled rule of law so far as the Madras High Court is concerned that a minor is not bound by a decree which has been passed against him as the result of the gross negligence of his guardian in the conduct of the suit. The same principle must apply to a case where a mother sues on behalf of her minor son and by her gross negligence allows the suit to be dismissed for default. It cannot be said that when subsequently the son becomes a major and sues for the same relief, such a suit was not maintainable because he had failed to apply for an order setting aside the dismissal of the prior suit. As section 5 of the Limitation Act does not apply to an application to set aside the order of dismissal for default, it would be monstrous to hold that the plaintiff was affected by the order of dismissal and therefore it must be held that he was entitled to ignore it.

Appeal under clause 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Rajamannar dated the 9th day of November, 1945, and made in S. A. No. 1627 of 1944, preferred to the High Court against the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 58 of 1944, preferred against the decree of the District Munsiff of Tuticorin in O. S. No. 56 of 1939.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

A. Swaminatha Aiyar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—Before the 25th September, 1908, the property in suit owned by four brothers, who were Indian Christians. On that date they sold the property to the plaintiff's father who died in the year 1929, being survived by his wife, his son and his five daughters. The son is the plaintiff in the suit out of which this appeal arises and his mother is the third defendant. One of the daughters is the fourth defendant.

On the 26th January, 1932, the first defendant purported to buy the propert from the heirs of the four persons who had sold it to the plaintiff's father on th 25th September, 1908. On the 27th January, 1932, four of the daughters release their rights to the plaintiff and the third defendant. On the 14th March, 193 the third defendant, on behalf of herself and as the guardian of the plaintiff a of the daughter who had not released her rights (the fourth defendant), sued the recovery of the property from the first defendant. The suit was filed in Court of the District Munsiff of Tuticorin and numbered as O. S. No. 103 of 19 It was subsequently transferred to the file of the District Munsiff of Koilpatti then numbered as O. S. No. 247 of 1934. On the 1st November, 1934, the t defendant allowed the suit to be dismissed for default.

On the 28th April, 1937, the third and fourth defendants released their r to the plaintiff who, on the 13th February, 1939, filed the present suit to re from the first defendant and his tenant, the second defendant, possession c entire property conveyed to the first defendant on the 26th January, 1932. first defendant contended that the sale to the plaintiff's father on the 25th Sept 1908, was really a nominal transaction and that no interest had passed. plea was rejected, as was a plea that the first defendant had acquired t adverse possession. The Court also considered the question whether O.9,

*L.P.A. No. 76 of 1945. 14th March,

rule 9 of the Code of Civil Procedure applied and held that it did not. The plaintiff was given a decree for joint possession of one-third of the property. This was based on the fact that after his father's death he became entitled, as an heir, to one-ninth of the property and that he acquired two-ninths under the deed of release of the 27th January, 1932. He was not entitled to the interests of his mother or the fourth defendant as the dismissal of Original Suit No. 247 of 1934 had the effect of barring any claim by them. The decree of the District Munsiff was affirmed by the Subordinate Judge of Tinnevelly and by Rajamannar, J., in second appeal. This appeal has been filed by the first defendant from the judgment of the learned Judge under clause 15 of the Letters Patent.

The only question which arises in the appeal is whether the plaintiff is affected by the provisions of Order 9, rule 9. It is well-settled rule of law so far as this Court is concerned that a minor is not bound by a decree which has been passed against him as the result of gross negligence on the part of his guardian in the conduct of the suit. The same principle must apply here.

On behalf of the appellant Mr. D. Ramaswami Aiyangar has contended that the plaintiff could not maintain the present suit because he failed to apply for an order setting aside the dismissal of the suit. The rule expressly empowers a plaintiff to apply for such an order and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court must set aside the order of dismissal. When the dismissal order was passed the plaintiff was still a minor. The suggestion is that as soon as he became a major he should have applied under Order 9, rule 9, for the setting aside of the order dismissing the suit. It is quite clear that he could not have filed an application under Order 9, rule 9 on attaining majority. Article 163 of the Limitation Act fixes the period of limitation at thirty days from the date of the order of dismissal. Section 5 of the Act does not apply to such an application. Therefore the plaintiff could not have made the application because more than thirty days elapsed between the date of the order of dismissal and the attainment of his majority. This being the position it would be monstrous to hold that the plaintiff was affected by the order of dismissal and we hold that he is entitled to ignore it. It was found by all the Courts that his mother was grossly negligent in allowing the suit to be dismissed and this is the governing fact.

The appeal fails and is dismissed with costs.

We may add that before Rajamannar, J., M. R. Ramaswami Aiyangar wished to raise a new point. The learned Judge rightly refused him leave.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Sri Raja D. K. Venkata Lingama Nayanim Bahadur Varu (since deceased) and another .. *Appellants**

v.

Rajah Inuganti Rajagopala Venkata Narasimha Rayanim Bahadur Varu and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 48 (2) (a)—*Exemption under—Facts to be proved which would entitle a claim for—Execution application beyond twelve years praying for continuation of proceedings in an earlier Execution Petition and asking for sale of certain properties not mentioned in the prior petition—"Fresh application" within the meaning of section* 48 (1)—*Court, if has a discretionary power to allow amendment of prior application after expiry of period of limitation.*

The allowance for maintenance of a junior member of the family of the Rajah of Kalahasti was by a decree made a charge on about 400 villages comprised in the Kalahasti zamindari and the final decree passed on 3rd May, 1927, directed the sale of those villages in realisation of the sum decreed in default of payment by the numerous judgment-debtors who had acquired interests in the villages charged under subsequent transfers by the Rajah. On 15th January, 1930, the decree-holder applied for execution by Execution Petition No. 20 of 1930 for recovery of the amount decreed

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* A. A. O. No. 305 of 1944. 4th September, 1946.

by the sale of 21 villages specified in the schedule to the petition and realised more than Rs. 90,000 by the sale of those villages, the last of which was sold in September 1939. As a sum of Rs. 9,620 still remained due under the decree, the decree-holder made an application, Execution Application No. 379 of 1939, on 1st November, 1939, in the previous proceedings which had not been formally terminated although all the reliefs claimed by the applicant therein had been granted to him. In the fresh application he prayed that the pending prior proceeding (E. P. No. 20 of 1930) might be continued and the recovery of the balance of the decree debt be ordered by the sale of seven new villages specified in that application. It was pleaded in bar of the execution application No. 379 of 1939, that it was barred under the provisions of section 48 of the Civil Procedure Code in that it was more than 12 years from the date of the decree. The decree-holder, however, claimed exemption under clause (a) of sub-section (2) of section 48 on the ground that the judgment-debtor had prevented him by fraud from executing the decree and that the Execution Application No. 379 of 1939 should not be regarded as a "fresh application" for execution within the meaning of section 48, sub-section (1) but should be dealt with as one for amending and continuing Execution Petition No. 20 of 1930 which was still pending.

Held, (*i*) it cannot be held that resistance to execution on legal grounds, however ill-founded, could amount to preventing execution by fraud within the meaning of clause (a) of sub-section (2) of section 48, Civil Procedure Code. Further, it is necessary for the decree-holder, in order to bring himself within the exemption, to prove that execution was prevented in the sense of being actually hindered or checked by the fraud of the judgment-debtor. In the circumstances, as the decree-holder had failed to establish this, he was not entitled to the benefit of the exemption.

Case-law reviewed.

(*ii*) Under the scheme of execution as provided for in Order 21, Civil Procedure Code, every application requiring the Court to proceed against a particular property, is a substantive application for execution and an application for attachment and sale or for sale without attachment of property B. where a previous similar application in respect of property A has succeeded or failed or is still pending, is a fresh application for execution and cannot be treated as one for amending and continuing the prior application although the prayer in the latter application may be worded in that manner. Where no question of limitation arises it is immaterial how the subsequent application is regarded, but when it is made beyond the period of limitation, its real character assumes importance and must be determined, paying more regard to the substance of the matter than to the form of the words used. In the circumstances, it cannot be said that the previous application, Execution Petition No. 20 of 1930 was really pending when Execution Application No. 379 of 1939 was filed. Although the former was not formally terminated, all the villages which the decree-holder required to be sold had been sold and no further relief could be granted on the basis of that petition which must therefore be regarded as no longer pending for the purpose of including by way of amendment new properties sought to be sold for realising the balance of the decree amount. Hence it is difficult to hold that Execution Application No. 379 of 1939 was not a fresh application for execution.

(*iii*) A decree-holder cannot be allowed to amend a previous execution petition by including fresh properties more than twelve years after the date of the decree. Such an application would be a "fresh application" for execution within the meaning of section 48 (1), Civil Procedure Code and the Court can have no discretionary power of allowing such an amendment, for to do so would plainly contravene the provisions of the section. Sub-section (2) amply safeguards the decree-holder's right to execute the decree even after the expiry of twelve years in certain cases, and the Court should not allow him in other cases to evade the provisions of the section under colour of amending a previous application so as to include fresh properties which he may wish to proceed against after the expiry of such period.

Case-law reviewed.

Appeal against the order of the Court of the Subordinate Judge, Chittoor, dated 9th March, 1944, in E.A. 379 of 1939 in E.P. No. 20 of 1930 in O.S. No. 86 of 1916.

A. Bhujanga Rao, D. R. Krishna Rao and *N. R. Amirthalingam* for Appellants.

K. Subba Rao for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This appeal arises out of proceedings in execution of a final decree for sale passed as far back as 3rd May, 1927, for a large sum of money claimed as arrears of maintenance due to a junior member of the family of the Rajah of Kalahasti. The 24th defendant in the suit (O.S. No. 86 of 1916 in the Court of the Subordinate Judge of Chittoor) who is the appellant before us, pleaded that the application filed in the lower Court on the 1st November, 1939 (E.A. No. 379 of 1939) more than 12 years from the date of the decree was barred under the provisions of section 48 of the Code of Civil Procedure, 1908. The respondent decree-holder claimed exemption under sub-section (2) of that section on the ground that the appellant had prevented him by fraud from executing the

decree. The Court below upheld the claim and ordered execution to proceed. The appeal is directed against that order.

The appeal first came on for hearing before Mockett, J., and one of us on 23rd July, 1945, when the case was referred to a Full Bench in view of the conflicting decisions of this and other High Courts as to the scope and meaning of "fraud" as that term was used in section 48 of the Code of Civil Procedure. Without going into that question, however, the Full Bench remanded the case to the District Judge of Chittoor with directions to require the decree-holder to furnish full particulars of the alleged fraud, and on the evidence called by both sides thereafter to submit his finding to the Division Bench which might then consider whether the case called for a reference to a Full Bench. The directions having been carried out and the learned Judge having considered the evidence and submitted his finding, the case now comes before us for final disposal.

The allowance for maintenance having been made a charge on about 400 villages comprised in the Kalahasti zamindari, the decree in question directed the sale of those villages in realisation of the sum decreed in default of payment by the numerous judgment-debtors who had acquired interests in the villages charged under subsequent transfers by the Rajah. On the 15th January, 1930, the respondent applied for execution by E.P. No. 20 of 1930 for recovery of the amount decreed by the sale of 21 villages specified in the schedule to that petition, and realised in the course of that protracted proceeding more than Rs. 90,000 by the sale of those villages, the last of which was sold in September, 1939. As a sum of Rs. 9,620 still remained due under the decree, he made an application, E.A. No. 379 of 1939, on 1st November, 1939, in the previous proceeding which had not been formally terminated although all the reliefs claimed by the respondent therein had been granted to him. In the fresh application he prayed that the pending prior proceeding (E.P. No. 20 of 1930) might be continued and the recovery of the balance of the decree debt be ordered by the sale of the seven new villages specified in that application.

In his affidavit of particulars of fraud filed on 1st October, 1945, after remand the respondent set out the history of the execution proceeding detailing the objections raised by the appellant "frivolously and vexatiously" at various stages and charging him with having fraudulently prevented the execution of the decree by such "obstructive tactics". He also submitted that,

"In any event the petitioner should be allowed to amend the execution petition No. 20 of 1930 by the inclusion of the additional villages and that this petition may be treated as such application."

In his counter-affidavit the appellant pleaded that the respondent's application for proceeding against the new villages not specified in the original execution petition, having been filed after the expiry of 12 years from the date of the decree, was not sustainable. He also averred that the respondent himself and the other judgment-debtors under the decree were responsible for the delay in execution and that, so far as he (the appellant) was concerned, there was no fraudulent conduct on his part which prevented the execution of the decree. He further alleged that he had recently come into possession of certain receipts passed by the respondent on 6th April, 1939, giving up his rights to proceed against the villages in the appellant's possession. He finally submitted that the respondent was not entitled to ask for amendment of the previous execution petition by the inclusion of the villages now sought to be brought to sale.

The learned District Judge found, after a review of the earlier proceedings till March, 1935, that there was nothing on the record to indicate that the appellant was guilty of any fraudulent conduct in relation to the execution of the decree. But he held that,

"the conduct of the 24th defendant in conveying the property to his sister in 1935 and getting a reconveyance in his favour in 1937, and again usufructuarily mortgaging it to his Rani in 1938 and getting a receiver appointed as per order Ex. P-43, and his applications, Execution Application Nos. 307, 316 and 319 of 1939 just prior to the sale which was actually held on 30th September, 1939, clearly reveal the fraudulent and dishonest intention on his part to hamper and impede the execution by all conceivable means."

Mr. Satyanarayana Rao for the appellant urged that there was no evidence to show that the acts and proceedings referred to by the learned Judge were the result of any fraudulent conduct on the part of the appellant and that, in any case, the said acts and proceedings in no way "prevented" the execution of the decree. On the other hand, Mr. Subba Rao for the respondent, while supporting the learned Judge's conclusion as regards the appellant's conduct during the later period, challenged the finding in regard to the earlier period. Mr. Subba Rao also submitted, alternatively, that the application of 1939 should not be treated as "fresh application for execution" within the meaning of section 48, as it was in substance and in form only an application for continuing the pending execution proceeding (E.P. No. 20 of 1930) for realisation of the balance of the decree amount by the sale of the additional villages already ordered by the decree to be sold.

As regards the earlier period (1930-35) the learned District Judge has elaborately examined the course of the execution proceedings and we consider it unnecessary to encumber this judgment with a detailed review of those proceedings as we are entirely in agreement with his conclusion that no fraud in connection with the execution has been established. The respondent's main complaint with reference to that period was that the appellant raised frivolous objections to execution in his counter-affidavit Ex. P-6 filed on 15th March, 1932, and ultimately withdrew them on 2nd February, 1935, by his memo. Ex. P-11 and that he was deliberately causing delay by having the proceeding adjourned from time to time by promises of settlement which he never intended to fulfil. We do not propose to enter into the merits of the objections raised by the appellant which are of a technical nature, as, whatever might have been the finding as to their legal validity if they had been pressed to a decision, it is difficult to say that he acted fraudulently in putting forward purely legal objections however untenable. It was, of course, his object to delay, if not to defeat, execution to whatever extent possible by raising, through his pleader, all pleas which law and procedure make available to him. But we are unable to hold that resistance to execution on legal grounds, however ill-founded, could amount to preventing execution by fraud within the meaning of sub-section (2) of section 48. We agree with the observation in *Bandhu Singh* v. *Kayastha Trading Bank*[1],

> "the raising of an objection, however frivolous, would not ordinarily amount to practising fraud on the decree-holder, for it can be easily met and disposed of by the Court."

It was said that the subsequent withdrawal of the objections showed that the appellant did not act *bona fide* in raising them. But the appellant's agent examined as R. W. 1, explained that the objections were withdrawn because the respondent's pleader assured him that the respondent would accept the proportionate amount due from the appellant and exonerate the villages in his possession from all further claim in execution. The learned Judge has believed this evidence which is uncontradicted. In fact, it is admitted that the respondent was entering into similar agreements with the other judgment-debtors at the time and received a considerable portion of the decree amount without having to bring the villages in their hands to sale. This brings us to the other ground of complaint.

In pursuance of the aforesaid scheme, the appellant also, it would appear, expressed his willingness to pay his proportionate share of the joint and several liability under the decree, and, on a joint application of both sides, the proceedings were adjourned for settlement on that basis, the following note being made on the petition :

> "It is said the parties are trying to settle. Failing settlement hearing positively on 1-10-1934."

The respondent says that this was a fraudulent move to gain time as the appellant made no payment and one of his villages included in that petition was brought to sale. As pointed out by the learned District Judge, however, the initiative for a settlement would appear to have proceeded from the respondent himself who was admittedly receiving amount *pro rata* from some of the other judgment-debtors in full discharge of their liability, and there is nothing on record to show that when the joint application for adjournment was made, the appellant had no *bona fide* intention to settle the matter on the lines proposed.

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1. (1930) I.L.R. 53 All. 419.

As regards the subsequent period (1935-39), the learned District Judge has, as already stated, found that the conduct of the appellant revealed " the fraudulent and dishonest intention on his part to hamper and impede the execution by all conceivable means." According to the learned Judge, the fraudulent conduct consisted in (1) the appellant conveying the property which the respondent wanted to proceed against to his sister in 1935 and getting a reconveyance in his favour in 1937, (2) usufructuarily mortgaging it to his Rani in 1938 and getting a receiver appointed as per order Ex. P-43, (3) filing the applications E.A. Nos. 307, 315 and 319 of 1939 just before the sale of the village on 30th September, 1939. We will now proceed to consider whether these acts or proceedings amounted to practising fraud on the respondent and prevented in any manner the execution of the decree.

It is admitted that the appellant sold the village of Pedda Kannali to his sister in March, 1935 (the exact date of the sale does not appear in the record) and that he got a reconveyance of the property in 1937. This was elicited in the cross-examination of the appellant's agent ((R.W. 1). The matter, however, was not pursued and no questions were put to him as to whether the sale was supported by any and what consideration; nor was any fraudulent purpose suggested as underlying such sale. But having regard to the fact that the sale was effected just about the time when the respondent filed his memorandum Ex. D-11 dated 28th March, 1935 asking for a sale of that village along with others belonging to the other judgment-debtors, the conduct of the appellant in conveying it to his sister who later put forward a claim to it in the execution proceeding, and getting a reconveyance of it when her claim was rejected does look highly suspicious. Assuming however it was a fraudulent act, it does not appear to have affected in any way the course of the execution proceedings. After the respondent filed his memo Ex. D-11, the sale papers were ordered to be filed by the 28th June, 1935 and on the 30th September, 1936 the sale proclamation was settled. On the 17th November, 1936 the village was ordered to be sold on 26th January, 1937. Just four days prior to the sale, *i.e.*, on 22nd January, 1937 two applications were made to the Court, E.A. Nos. 16 and 17 of 1937. E.A. No. 16 was filed by a receiver, who had been appointed in execution of a money decree obtained against the appellant's father, objecting that the village was in his possession and management as receiver and should not be brought to sale without notice to him and without obtaining the permission of the Court which appointed him, and asking that the sale posted to 26th January, 1937 should be stopped. E.A. No. 17 was filed by the appellant's sister who as already stated claimed to have purchased the village from the appellant and raised various objections to the respondent proceeding against that village. She also prayed that the sale should be stayed pending the disposal of her petition. Both these applications were dismissed by the Court on 1st March, 1937. But even before these applications were filed the respondent himself had applied in E.A. No. 12 of 1937, dated 7th January, 1937, under Order 21, rule 72 of the Code of Civil Procedure, (Ex. D-8), praying that he be given permission to bid at the sale ordered to be held on 26th January, 1937 and to credit the sale amount towards the decree. This application was opposed by another judgment-debtor (11th defendant) whose property was also being brought to sale, but the appellant raised no objection. The Court granted the permission asked for by its order dated 1st March, 1937. It is obvious that the sale fixed for 26th January, 1937 could not take place before the respondent's own application for leave to bid and set-off was disposed of on the 1st March. Thus the applications (E.A. No. 16 and 17 of 1937) referred to above for stopping the sale which were also disposed of on the same date did not in fact prove an obstacle to the holding of the sale on 26th January, 1937 which had necessarily to be postponed in view of the respondent's own application E.A. No. 12 of 1937 previously filed. The appellant's transfer to his sister and the latter's application on the strength of it to stop the sale, assuming it to have been fraudulently brought about by him, cannot, therefore, be said to have prevented execution, and the respondent cannot claim the benefit of the exemption under section 48, sub-section (2).

A similar conclusion is called for in regard to charges (2) and (3) which may be conveniently dealt with together. The appellant purported to mortgage the village Pedda Kannali with possession of his wife Venkata Boyamma in 1938. It appears from Ex. P-43 that in execution of a money decree obtained by another creditor against the appellant the village was attached by another Court, and the appellant's wife intervened with a claim based on the mortgage. There was a compromise as a reslult of which one Srinivasalu Chetti was appointed receiver of the village to take possession and collect the rents and profits thereof out of which Rs. 600 was to be paid to the attaching decree-holder and other creditors before the end of each fasli and the balance, if any, to the appellant's wife. This was on the 19th July, 1939. Before that date, on 15th July, 1939, the Court executing the respondent's decree had ordered the village to be sold on the 5th September, 1939, the proceeding having dragged on in the meanwhile for reasons for which the appellant was not responsible. On the 4th September the respondent himself filed E.A. No. 277 of 1939 praying for an adjournment of the sale to 26th September, on the ground that his application for permission to bid at the sale had not been disposed of and the sale was accordingly adjourned. On the 26th the sale was actually started but it was not concluded as the appellant filed on that day E.A. No. 307 of 1939 stating that his agent had gone to Hyderabad for the purpose of effecting a settlement with the respondent who was then staying there and praying that the sale should be continued from day to day for one week at the cost of the appellant pending advices from Hyderabad. This petition was opposed on behalf of the respondent but the learned Judge directed the extension of the sale from day to day till the 30th September, "purely as a matter of mere indulgence." Meanwhile, the appellant had also filed two other applications, E.A. Nos. 315 and 316 of 1939 dated 11th September, 1939, requiring the respondent to file into Court a statement of account and asking for a determination of the amount due to him, and the other for stopping the sale on the ground that the village was in the possession of a receiver appointed by the District Court, Chittoor, under the compromise Ex. P-43 already referred to and the previous sanction of that Court was necessary. These two applications along with another filed on the 30th September, 1939, E.A. No. 319 of 1939, praying for the continuance of the sale for a fortnight to enable the appellant to effect a settlement, if possible, were all dismissed on that day and the sale of the village was concluded in favour of the respondent himself. As regards E.A. No. 307 of 1939 referred to above, no fraud on the part of the appellant in filing the same has been established. The statement in the affidavit (Ex. P-37) filed in support of that application that the appellant's agent had gone to Hyderabad for the purpose of effecting a settlement with the respondent has not been shown to be false. In this connection it may be mentioned that the statement in the order (Ex. P-36) passed on that application that "the other side denies the truth of the alleged settlement," is not quite correct. No concluded settlement was in fact alleged, the only allegation being that "There was every chance of effecting the settlement with respect to the village to Pedda Kannali by paying of the proportionate liability." Nor can it be said that that application in any way prevented the execution, for it sought, not the stay of the sale which was held on the day fixed for it, but only its continuance from day to day which was ordered for four days "as a matter of mere indulgence". The same remark applies to E.A. No. 315 of 1939 which merely asked for a statement of account from the respondent and for determination of the amount due to him before the sale was held. In E.A. No. 316 the appellant no doubt wanted the sale to be stopped on the ground that the village being in the possession of a receiver appointed by a different Court, the sale could not be held without the previous sanction of that Court. It was suggested for the respondent and the suggestion has apparently been accepted by the learned Judge, that the usufructuary mortgage by the appellant to his wife, the latter's intervention in the execution of another decree resulting in the compromise evidenced by Ex. P-43, the appointment of a receiver in pursuance of the compromise and the appellant's application for stopping the sale on that ground, all formed part fo a fraudulent scheme designed to delay the execution of the res-

pondent's decree. There is, however, nothing to indicate any collusion between the appellant and the decree-holder who was executing his decree in the District Court of Chittoor and for whose benefit the receiver was appointed by that Court. The terms of the compromise clearly show that the usufructuary mortgage in favour of the appellant's wife was practically set aside as the receiver had to pay bulk of the net rents and profits to that decree-holder and other creditors of the appellant. Nor is there any evidence to show that the mortgage executed by the appellant in favour of his wife in 1938 was a sham and fraudulent transaction. As in the case of the sale to the appellant's sister, the matter was not pursued in the cross-examination of R.W. 1 who spoke to its execution, and there is nothing more than suspicion to proceed upon. It may be that the transaction was brought about in order to screen the property from the creditors whose claims were provided for in the compromise Ex. P-43. But even so, it did not, as we have seen, prevent the execution of the respondent's decree. The sale was actually held without any postponement on the 26th September, 1939 to which date it had been adjourned at the instance of the respondent himself, and was concluded on the 30th when all these petitions were dismissed. It follows that the respondent cannot invoke the exemption enacted in section 48, sub-section (2), clause (a). It is to be noted that the learned Judge, while finding that the appellant's conduct revealed "fraudulent and dishonest intention on his part to hamper and impede the execution by all conceivable means", has not considered whether the execution was in fact hampered and impeded by such conduct, probably because he thought that the scope of the enquiry directed by the remand order was limited to the allegations of fraud. We have accordingly had to determine the question for ourselves.

It has been contended for the respondent that section 48, sub-section (2) (a), should not be narrowly interpreted, and that it is not necessary for the decree-holder, in order to bring himself within the exemption, to prove that execution was prevented in the sense of being actually hindered or checked by the fraud of the judgment-debtor. This contention which is contrary to the plain language of the clause seems at first blush to be supported by the decision of this Court in *Ramanathan Chettiar* v. *Mahalingam Chettiar*[1], the headnote of which runs as follows :

"The mere fact of a fraud having been committed by the judgment-debtor can be availed of by the decree-holder for claiming exemption under section 48 (2) (a) of the Code of Civil Procedure, and in order to succeed it is not necessary for him to show by evidence that on account of that fraud he was actually prevented from executing his decree. In many cases it will no doubt be easy to establish the connection between the fraud perpetrated by the judgment-debtor and the failure of the decree-holder to execute the decree on account of the fraud. Cases of that description should not, however, be used to restrict the meaning of the expression, where the judgment-debtor, has, by force or fraud, prevented the execution of the decree."

The case in an illustration of how a headnote, though framed in the very words used in the judgment, can yet be misleading if those words are taken away from the context of the particular facts and given an abstract setting. The decree there in question was passed on the 27th November, 1911, and the execution application was presented on the 27th July, 1928 praying for attachment of a decree obtained by the judgment-debtor against a third party. On the 25th October, 1918 the judgment-debtor purported to effect a sale of certain property belonging to him. The sale was impeached by another creditor as being sham and fraudulent and was ultimately adjudged to be such in September, 1927. The decree-holder claimed exemption under section 48, sub-section (2) clause (a) relying on that fraudulent alienation by the judgment-debtor, and the lower Court had upheld the claim. The judgment-debtor appealed to this Court contending, in the words of the judgment at page 314 that,

"In order to succeed in his plea under section 48 (2) (a), the decree-holder must show that the judgment-debtor has by fraud prevented the execution of the decree and this he cannot be considered to have shown unless there is evidence that he actually attempted to execute his decree against the property which formed the subject-matter of the fraudulent alienation and was defeated in getting

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1. (1934) 67 M.L.J. 751 : I.L.R. 58 Mad. 311.

execution. This argument was presented in another aspect also, namely, that the decree-holder in order to succeed, will have also to show that he took steps to proceed against all the other properties of the judgment-debtor before proceeding against the alienated properties in execution. It is only if these conditions are fulfilled that the Court can say, according to the appellant's contention, that the judgment-debtor has by 'fraud . . . prevented the execution of the decree. . . .' In other words, the mere fact of a fraud having been committed by the judgment-debtor cannot be availed of by the decree-holder from claiming exemption under section 48 (2) (a) of the Code of Civil Procedure, unless he is *able to show by evidence that on account of that fraud he was prevented from executing his decree* in the manner indicated above."

It is in repelling this contention that the learned Judges made the observations extracted in the headnote. It will be seen that the expression "the mere fact of a fraud having been committed" was used in contradistinction to what the appellant contended must *also* be proved in such cases, *viz.*, (1) that the decree-holder took steps to proceed against all the other properties of the judgment-debtor before proceeding against the aliented property and (2) that he actually attempted to execute the decree against the property fraudulently alienated and was defeated in getting execution. The learned Judges held that it was not necessary for the decree-holder to prove such facts in order to avail himself of the judgment-debtor's fraudulent alienation as a ground of exemption under section 48 (2) (*a*). It may be that a decree-holder who waits to see the outcome of a litigation carried on by another decree-holder against the same judgment-debtor impeaching an alienation of property by the latter as fictitious and fraudulent, and refrains from executing his own decree is placed under some mental constraint by the fraudulent conduct of the judgment-debtor who in that sense prevents execution of the decree by his fraud, and it may not be necessary for the decree-holder in such circumstances to show by evidence that his failure to execute was due to the fraudulent act of the judgment-debtor. We are not, however, called upon in the present case to consider whether that view is correct. It may be that the interpretation of the expression "prevented the execution" by Shephard, O.C.J. in *Seshachalam* v. *Rajan Chetty*[1], where he understood it as meaning "rendered it impossible to realise" was too narrow as the learned Judges were inclined to think, while their own interpretation was too wide. Be that as it may, their decision has no application to the present case where the respondent was actually executing his decree, and if, in relation to that proceeding he puts forward any fraudulent act of the appellant as a ground of exemption under section 48 (2) (*a*), it is, in our judgment, necessary for him, in order to succeed, to establish that the fraudulent act complained of hindered or checked in some way the proceeding which he was prosecuting. As the respondent has failed to establish this, he is not entitled to the benefit of the exemption.

It was next urged on his behalf that E.A. No. 379 of 1939 should not be regarded as a "fresh application for execution" within the meaning of section 48, sub-section (1) but should be dealt with as one for amending and continuing E.P. No. 20 of 1930 which was still pending. Although this point was not raised at any previous stage of the case, we have allowed it to be argued as it involves only a pure question of law. As stated already, the prayer in E.A. No. 379 was that

"E. P. No. 20 of 1930 may be continued and (the Court may) order the recovery of the balance of the decree debt as shown hereunder by the sale of the following villages and if the sale proceeds are not sufficient, order the sale of the other villages mentioned in the decree."

At the end of the application a list of seven villages was given as "villages against which execution is sought at present". Two of these villages, Konathaneri and Chintapudi belong to the appellant. These villages, although ordered to be sold under the decree, were not among the villages included in E. P. No. 20 of 1930; these villages had all been sold but that petition not having been closed was still on the file of the Court, although nothing more remained to be done thereunder, when E.A. No. 379 of 1939 was filed. The question is whether, in such circumstances, the latter application should or should not be regarded as a "fresh application for execution" within the meaning of section 48, sub-section (1).

1. (1898) 8 M.L.J. 203.

Though the Code of Civil Procedure speaks of an "application for execution" it does not contemplate an application for execution being made in general terms and kept pending till the decree amount is fully realised. Section 51 and Order 21, rule 11 (2) (*j*) show that an application for execution is an application to take one or more of the steps specified therein in execution of a decree. And rules 12, 14 and 17 further make it clear that those steps should be required to be taken in respect of some specific property or properties. Thus an application for execution is an application for attachment and sale of certain property or for the arrest and detention in prison of the judgment-debtor or for taking some other steps in execution of a decree. The Code contemplates successive applications being made to the Court to execute the decree by taking one or more of such steps and the Court is bound to assist the decree-holder in the mode required by him subject to the exercise of its discretion as to simultaneous execution against the person and property of the judgment-debtor under rule 21, provided of course that the application is not barred by any provision of law. It seems to me that, under such a scheme, every application requiring the Court to proceed against a particular property is a substantive application for execution, and an application for attachment and sale or for sale without attachment of property B where a previous similar application in respect of property A has succeeded or failed or is still pending is a fresh application for execution and cannot be treated as one for amending and continuing the prior application, although the prayer in the later application may be worded in that manner. Where no question of limitation arises it is, of course, immaterial how the subsequent application is regarded, but when it is made beyond the period of limitation, its real character assumes importance and must be determined, paying more regard to the substance of the matter than to the form or the words used.

Applying these principles to the facts of the present case, we find it difficult to hold that E.A. No. 379 of 1939 was not a fresh application for execution. The above reasoning applies *a fortiori* here, for it cannot even be said that the previous execution proceeding, E.P. No. 20 of 1930, was really pending when that application was filed. As has been stated, although it had not been formally terminated, all the villages which the respondent then required to be sold had been sold, and no further relief could be granted on the basis of that petition which must therefore be regarded as no longer pending for the purpose of including by way of amendment new properties sought to be sold for realising the balance of the decree amount. (Cf. *Badrinarayan Chetlingia* v. *Baidya Nath Pal*[1].

Reliance was placed for the respondent on a recent decision of the Calcutta High Court in *Shekendar Ali Miya* v. *Abdul Gafur Chaudhuri*[2], where that Court held that an application for permission to proceed against fresh properties when it was discovered that those mentioned in the earlier execution petition were not attachable was not a fresh application for execution but only a matter of amendment of the previous petition and that the Court had a reasonable discretion in allowing it provided the amendment did not alter the character of the execution. The learned Judges followed *Gnanendra Kumar Roy Choudry* v. *Rishendra Kumar Roy Choudry*[3], which however dealt with the execution of a rent decree governed by the special provisions of limitation contained in Schedule III annexed to the Bengal Tenancy Act. They distinguished *Hyatunnissa Chowdhurani* v. *Achia Khatun*[4], where the Court refused to accept an application filed beyond 12 years from the date of the decree for adding fresh properties to the list given in an application filed within twelve years, as possibly proceeding on the decree-holder's want of care and diligence. No reference was made to *Sultan Hasan* v. *Nanki Bibi*[5], where an application for "continuing" a prior execution petition by attaching certain new properties was refused as barred by section 48. It may well be that, as laid down in *Bandhu Singh* v.

1. (1934) 60 C.L.J. 123.
2. I.L.R. (1941) 2 Cal. 251.
3. (1918) 22 C.W.N 540.
4. (1923) I.L.R. 50 Cal. 748.
5. A.I.R. 1928 Cal. 241 (2)

Kayastha Trading Bank [1], on which also the learned Judges relied, the Court had ample powers of allowing amendment of execution petitions apart from remedying formal defects under Order 21, rule 17, but, with all respect, we are unable to agree that a decree-holder can be allowed to amend a previous execution petition by including fresh properties more than twelve years after the date of the decree. For the reasons we have indicated, such an application would be a fresh application for execution within the meaning of section 48, sub-section (1) and accordingly barred under the provisions of that section. A similar view has been expressed in *Bandhu Singh* v. *Kayastha Trading Bank*[1], *Ramrattan* v. *Datar Kaur*[2], and *Gajanand Sha* v. *Dayanand Thakur*[3].

Reference was made to the decisions of this Court in *Kumar Venkata Perumal* v. *Velayudha Reddi*[4], and *Thandavamurthi* v. *Durgamba*[5]. In each of these cases the Court refused to treat an application filed by the decree-holder more than twelve years after the decree to proceed against fresh properties of the judgment-debtor as an application to amend and continue an earlier petition for execution filed within such period. But there are observations which would seem to imply that the Court might, in special circumstances, allow such amendment and order execution against new properties even after the expiry of that period. Relying on these observations, Mr. Subba Rao submitted that, in view of the peculiar circumstances of the present case where the decree itself ordered the sale of the property now sought to be sold and the decree-holder had to proceed against properties in the hands of numerous judgment-debtors, we should allow E.P. No. 20 of 1939 to be amended and continued in respect of the new items of property mentioned in E.A. No. 379 of 1939. We are unable to accede to this suggestion. With all respect, we are not satisfied, that the observations referred to above, which must be regarded as *obiter*, correctly state the position. If an application to proceed against fresh properties of the judgment debtor is to be regarded, as in our opinion it should be, as a fresh application for execution it is difficult to see how the Court can have a discretionary power of allowing the decree-holder to proceed against new items of properties after the expiry of twelve years by way of amending a previous petition for execution filed within that period, for to do so would plainly contravene the provisions of section 48, sub-section (1). Sub-section (2) amply safeguards the decree-holder's right to execute the decree even after the expiry of twelve years in certain cases, and the Court should not, as it seems to us, allow him in other cases to evade the provisions of the section under colour of amending a previous application so as to include fresh properties which he may wish to proceed against after the expiry of such period. We find nothing opposed to this view in *Jhorama Patrani* v. *Latchanna Dora*[6], to which also our attention was called. The decree-holder in that case did not seek to add fresh items of property to those included in his previous application for execution but only to add a prayer for attachment of some of those items which, having been released from attachment as unenfranchised service inams not liable to attachment, had since been enfranchised and thus become liable to be attached. The previous application which was filed during the subsistence of the prior attachment had asked for the sale of those properties, and all that the decree-holder subsequently required was that they should be re-attached before they were brought to sale, as the previous attachment had been set aside.

An attempt was made on behalf of the appellant to establish that the decree in question had been adjusted by the respondent accepting the payment *pro rata* from the appellant's predecessor-in-title and agreeing to exonerate the villages since transferred to the appellant and now sought to be sold from all further claim under the decree. C.M.P. No. 2836 of 1945 has been filed in this High Court for the admission of a letter dated 6th April, 1930 and alleged to have been passed by the respondent acknowledging the receipt of such payment and undertaking not to execute the decree against the villages which were then in the possession

1. (1930) I.L.R. 53 All. 419.
2. A.I.R. 1928 Lah. 808.
3. (1942) I.L.R. 21 Pat. 838.
4. (1914) 27 M.L.J. 25.
5. A.I.R. 1928 Mad. 1154.
6. (1939) M.W.N. 988.

of the appellant's transferor. It is not necessary to consider whether sufficient grounds have been made out for the admission of the document at this stage, for, assuming that the document is genuine and is properly admissible in evidence, the alleged adjustment, not having been duly recorded cannot be recognised in these proceedings in view of the provisions of Order 21, rule 2. The plea of adjustment cannot therefore be entertained.

In the result, the appeal is allowed, and E.A. No. 379 of 1939 is dismissed with costs throughout so far as the appellant is concerned.

V.S. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR SIDNEY WADSWORTH, *Officiating Chief Justice*, MR. JUSTICE RAJAMANNAR AND MR. JUSTICE KUPPUSWAMI AYYAR.

K. M. Narayanan Nambudiripad and others .. *Appellants**

v.

Varnasi *alias* Maravancheri Vadakketath Manakkal Sankaran Nambudiripad and others .. *Respondents.*

Malabar Law—Nambudiri family—Powers of karnavan—Liability of illom for debts incurred by karnavan in the running of a kuri—The Madras Nambudri Act (XXI of 1933), section 26—Scope and effect of—Liability of sons and grandsons under the pious obligation theory—If applies to Nambudiris.

Per, Full Bench.—It is not, in the absence of a special custom, within the power of the karnavan or manager of a Nambudiri illom to bind the properties of the family with liabilities arising out of the running of a kuri.

The decisions in *Narayanan Nambudiri* v. *Sundara Aiyar*, (1935) 43 L.W. 584 and *Narayanan Nambudiri* v. *Chalapuram Bank, Ltd.*, App. No. 108 of 1936 to the extent to which they purport to hold otherwise are erroneous.

Apart from the question of kuris, it does not appear to have been recognised in any decision that the karnavan of a Nambudiri illom has any greater power of imposing liability upon the family property than the manager of an ordinary Hindu joint family. The obligation incurred by a family manager who in order to raise money not only becomes a subscriber to a kuri but undertakes the responsibility for seeing it through to a successful conclusion is one which cannot be made a family liability unless such an activity is clearly within the powers of the manager.

Case-law discussed.

The karnavan of a Nambudiri illom along with his two younger brothers started and conducted a kuri. The stakeholders took the amount of the first draw. In suits against the stakeholders by a subscriber who had not drawn a prize and who was therefore entitled to the full amount of his subscriptions, which was not paid, and by another who had not been paid the full amount due to him under the rules, it was contended that the *mana* of the stakeholders was liable in as much as the amount of the first draw, representing the first year's subscriptions to the kuri, went to meet certain necessary expenditure of the *mana* and to discharge certain binding debts of the *mana*.

Held (by the Division Bench), that the claim of the plaintiffs in both the suits must fail in so far as it seeks to make the *mana* liable for the amounts due from the stakeholders as such to the subscribers.

Further, in view of the true nature of the transaction of the kuri, in the suits brought against the stakeholders as such and the *mana* as being itself liable *qua* stakeholder, it is impossible to give a decree against the *mana*, not *qua* stakeholder, but *qua* debtor to the fund administered by the stakeholders.

On a question as to the liability of the sons and the grandsons of the three original stakeholders to pay the debts of their fathers and grandfathers under the pious obligation rule,

Held, that the matter was really governed by section 26 of the Madras Nambudri Act of 1933. Clearly it was the intention of that Act to make certain specified changes in the law and usage governing Nambudiri community and to change nothing which was not expressly embodied in the statute. As according to the law and usage of Nambudiris as it stood before the Act came into force, a Nambudiri son was not liable for the debts of his father under any theory of pious obligation, clearly he could not have become liable by any implied change of the law under that statute.

Case-law reviewed.

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* Appeals Nos. 127 and 341 of 1944. 27th August, 1946.

Appeals against the decrees of the Court of the Subordinate Judge, Ottapalam, in O. S. Nos. 34 of 1939 and 1 of 1942, respectively, dated 6th September, 1943.

Appeal No. 127 *of* 1944.—

B. Sitarama Rao for Appellant.

P. Govinda Menon, D. H. Nambudiripad and *S. Venkatachala Sastri* for Respondents.

Appeal No. 341 *of* 1944.—

P. Govinda Menon and *D. H. Nambudiripad* for Appellants.

D. A. Krishna Wariar for Respondent.

This appeal coming on for hearing on the 26th August, 1946, the Court (*Wadsworth, O.C.J.* and *Rajamannar, J.*) made the following

ORDER OF REFERENCE TO THE FULL BENCH.—We refer to the Full Bench the following question:

"Whether with reference to the decision in *Narayanan Nambudiri* v. *Sundara Aiyar*[1] and *Narayanan Nambudiri* v. *The Chalapuram Bank, Ltd.*[2], it is within the powers of the karnavan of the Nambudiri illom to impose on the illom liability for debts incurred in running a kuri or chit in the absence of any family custom."

This appeal coming on for hearing, in pursuance of the aforesaid Order of Reference, the Court expressed the following

OPINION : *The Officiating Chief Justice.*—The question referred to the Full Bench is whether, with reference to the decisions in *Narayanan Nambudiri* v. *Sundara Aiyar*[1] and *Narayanan Nambudiri* v. *The Chalapuram Bank, Ltd.*[2], it is within the power of the karnavan of Nambudiri illom to impose on the illom liability for debts incurred in running a kuri or chit, in the absence of any family custom. Before dealing with this reference we wish to make it clear at the outset that we are not concerned with the question whether for necessity a karnavan can borrow from a chit fund, nor are we concerned with a case in which it can be shown that the running of chits is an established institution in a particular family justified by the custom of that family.

The facts so far as they are necessary in the present case are that the first and second defendants and their elder brother Narayanan Nambudiripad who is now dead and who was at that time the karnavan of the illom or *mana*, started a kuri in 1917. This kuri was one of a very usual type. There were to be 20 subscribers besides the stakeholders. Each subscriber was to pay a subscription of Rs. 600 yearly for 20 years. The stakeholders were to receive the whole of the money for the first year and in subsequent years, after deducting Rs. 600 which was to be distributed by way of interest, the balance was to be put up to auction and the subscriber who bid the biggest discount was to get the money, the discount being distributed amongst the subscribers. The stakeholders made themselves liable for any loss which might ensue and they bound their property also. They were charged with the duty of collecting the subscriptions, holding the auctions and looking after the security which was to be taken from those who had drawn prizes in the successive auctions, so as to guarantee that their future subscriptions would be forthcoming. The kuri continued to run until its maturity at which date there was one subscriber, the plaintiff in the suit out of which A.S. No. 127 arises, who had not drawn a prize and was therefore entitled to the full amount of his subscriptions, which was not paid, and another subscriber, the plaintiff in the suit out of which A.S. No. 341 arises, who had not been paid the full amount due to him under the rules.

For the purposes of the present reference we are assuming that the first and second defendants and their elder brother started this kuri as a transaction of their family, though it must be observed that this is not conceded by the other members

1. (1935) 43 L.W. 584.

2. Appeal No. 108 of 1936.

of the family. Now the general rule laid down by the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[1] and *Benares Bank, Ltd.* v. *Hari Narain*[2], is that the manager of a joint Hindu family cannot impose on the joint family and particularly on the minor members thereof, liability for debts incurred in connection with a new trade or business. This rule, of course, does not apply to the opening of new branches of the family firm by trading families and it has been held not to apply to the starting of a reconstituted business on the dissolution of an old family partnership. But we are not concerned here with those special cases. Here we have a family which is not a trading family and not, so far as we know, a family ancestrally employed in the running of kuris or chits. Is there anything special or peculiar about the position of a Nambudiri karnavan which gives him powers such as are denied to the manager of an ordinary Hindu family by the decisions of the Privy Council which we have just quoted ? Is there anything peculiar about the running of a kuri or chit which would take such an activity out of the category of a new and speculative business ?

It was held in *Vasudevan* v. *Secretary of State for India*[3] and *Vishnu Nambudiri* v. *Akkamma*[4], that Nambudiri families are governed by Hindu law except to the extent to which it can be shown that they have by custom assimilated the peculiarities of their neighbours who follow the Marumakkattayam system. The chief peculiarity established in the case of Nambudiri illoms which might affect the consideration of this question is that the family was until the Nambudri Act XXI of 1933 impartible. In other respects the power of the karnavan to impose liabilities on the family seems to have been substantially the same in the Nambudiri families as it is in ordinary Hindu families. It is a little difficult to see how the impartibility of the family would by itself add to the karnavan's power of imposing liability upon the family property. No doubt impartibility makes it more difficult to enforce a personal liability against the karnavan for his acts, but the difficulty experienced by the creditor will not of itself increase the borrowing power of the debtor. Apart from the question of kuris it does not appear to us to have been recognised in any of the cases to which our attention has been drawn that the karnavan of a Nambudiri illom has any greater power of imposing liability upon the family property than the manager of an ordinary Hindu joint family.

There are however two decisions in which it seems to have been recognised that the karnavan of a Nambudiri family may legitimately bind the family properties with liability in connection with the running of a kuri or chit. Ramesam, J., dealing with an East Coast family held in *Natesa Aiyar* v. *Sahasranama Aiyar*[5], that the running of a chit fund was a speculative business and that a joint Hindu family could not be bound by liabilities incurred by the manager for such purposes. In *Narayanan Nambudiri* v. *Sundara Aiyar*[6] Cornish and Stodart, JJ., had to deal with the case of a karnavan of a Nambudiri illom who started a kuri with the object of paying off the debts of the illom. The question was raised whether, if the illom was benefitted by drawing money, from the kuri, the family property would be liable for the amount of the subscriptions paid by the subscribers who had not drawn prizes when the kuri came to grief before its maturity. The learned Judges quote the decision of Ramesam, J., in *Natesa Aiyar* v. *Sahasranama Aiyar*[5], but appear to be under the misapprehension that that was not a case of a manager conducting a chit as the stakeholder, but was merely a case of a manager mortgaging the family property for the purpose of subscribing to a chit fund. The learned Judges then go on to say that there is nothing illegal or immoral about a kuri—which it seems to us, with all respect, to be irrelevant for the purpose of finding out whether as a speculative venture it can bind the family ; and they dismiss the decision of the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[1], as having no applica-

1. (1922) 43 M.L.J. 41 : L.R. 49 I.A. 108 : I.L.R. 49 Cal. 560 (P.C.).
2. (1932) 63 M.L.J. 92 : L.R. 59 I.A. 300 ; I.L.R. 54 All. 564 (P.C.).
3. (1887) I.L.R. 11 Mad. 157.
4. (1910) 20 M.L.J. 938 : I.L.R. 34 Mad. 496.
5. (1927) 53 M.L.J. 550.
6. (1935) 42 L.W. 584.

tion to the facts of the case "because no new business was started when this kuri was organised." We do not know whether in fact the family in question was one, which as a matter of family custom had been organising kuris from time immemorial or whether the learned Judges merely intended to say that though the venture was new it was not a business. However that may be, the conclusion of the learned Judges is that the plaintiffs are entitled to recover the money "because the illom has had the benefit of it."

We find it somewhat difficult to appreciate the ground on which the application of the rule laid down by the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[1] was excluded. If authority is needed for the proposition that the running of a kuri is a money-lending business it can be found in the decision in *Ramaswami Bhagavathar* v. *Nagendrayya*[2]. Leaving aside the aspect in which each of the subscribers may be said to be a borrower from the common fund, and concentrating our attention on the position of the stakeholder as organiser and guarantor of the whole concern and the person who hopes in the long run to make the greatest profit out of it, it is difficult to see how the venture can from this standpoint be anything other than a profit-earning business.

The other decision upon which reliance has been placed as authorising a Nambudiri karnavan to start new kuri ventures at the risk of the family is an unreported case, *Narayanan Nambudiri* v. *The Chalapuram Bank, Ltd.*,[3] decided by Madhavan Nair and Stodart, JJ. The learned Judges were dealing with a kuri not very different in its terms from that with which we are now concerned. They find that the karvavan of a Nambudiri illom is competent to invest surplus revenue of the illom in proper investments and to borrow money for family purposes. They find as a fact that the chit in question was started and conducted on behalf of the illom and that the money raised thereby and drawn by the stakeholders was utilised for the benefit of the illom. They then proceed to consider whether this constituted a prudent method of borrowing, recognising that it was not open to a karnavan to pledge the credit of the family in a rash and speculative manner. They go on to consider the whole business as a mere method of borrowing; not regarding it in any sense of the word as a business involving risk. They point out how the stakeholders, although they have to refund to those subscribers who had not got prizes the aggregate amount of their past subscriptions, have such ample opportunities for safeguarding themselves by taking security that the transaction is really free from risk or danger and therefore one which constitutes a prudent method of borrowing on the part of the karnavan of the family. Nowhere in this judgment is there any reference to the decisions of the Privy Council on the power of a manager to start a new business at the risk of the family and the cases which we have already quoted are not cited.

We do not propose to deal with the power of a karnavan of a Nambudiri illom to raise money for family purposes by borrowing as a subscriber from a chit fund. It does however seem to us that the obligation incurred by a family manager who in order to raise money not only becomes a subscriber to such a fund but undertakes the responsibility for seeing it through to a successful conclusion, is one which cannot be made a family liability unless such an activity is clearly within the powers of the manager. We are dealing in the present case with a venture which had to run for as long as twenty years and involved the collection of very considerable sums of money. Such a venture must necessarily be affected financially by fluctuations of prices and fluctuations in the value of money, to say nothing of fluctuations in the solvency of the subscribers. It seems to us that Ramesam, J., was right in his conclusion in *Natesa Aiyar* v. *Sahasranama Aiyar*[4], that such an undertaking is from its very nature and from the long period over which the business extends a risky business. Although it may be said that the karnavan gets better

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1. (1922) 43 M.L.J. 41 : L.R. 49 I.A. 108 : I.L.R. 49 Cal. 560 (P.C.).
2. (1895) 5 M.L.J. 275 : I.L.R. 19 Mad. 31.
3. Appeal No. 108 of 1936.
4. (1927) 53 M.L.J. 550.

terms if he wishes to borrow for the family by being not merely a subscriber to the fund but also responsible for administering it, the very reason why he gets such good terms is surely not so much the labour attached to the administration but the risk which he runs of being involved in litigation and losses, due to the default of other subscribers or to fluctuations in the value of money and prices which will affect the economics of the scheme. We may add that Abdur Rahman and Somayya, JJ., in an unreported decision, *Kuthannu Kizhakkathara Bhagavati by Executive Officer Arikkath Ravunni Nair* v. *Kalyani*[1], dealing with the powers of a trustee in Malabar to bind devaswom property with liabilities arising out of the running of a kuri, held that such a transaction was of a speculative nature which could not properly bind the trust. We consider that it is not, in the absence of a special custom, within the power of the manager of a Nambudiri illom to bind the properties of the family with liabilities arising out of the running of a kuri.

Our answer to the reference therefore is that we are of the opinion that the decisions in *Narayanan Nambudiri* v. *Sundara Aiyar*[2] and *Narayanan Nambudiri* v. *The Chalapuram Bank, Ltd.*[3] are erroneous to the extent that they purport to hold that it is within the power of the karnavan of a Nambudiri illom to impose on the illom liabilities arising out of the running of a kuri or chit, in the absence of any family custom. The costs of the reference will be costs in the appeals.

These appeals coming on for hearing after the Opinion of the Full Bench, The Court (*Wadsworth, O.C.J., and Rajamannar, J.*) delivered the following

JUDGMENT, 28th August, 1946: *The Officiating Chief Justice.*—In both these appeals the main question is whether a Nambudiri *mana* or illom can be held liable for the debts due by its karnavan and its two senior anandravans as a result of the mismanagement of a kuri or chit started by them originally for the purpose of meeting the obligations of the *mana* itself. On this question the decision of the Full Bench is to the effect that it is not within the powers of the karnavan of a Nambudiri illom to impose on the illom liability for the debts incurred in running a kuri or chit in the absence of any family custom. The Full Bench has distinguished between the liability which the family may have as a subscriber to the chit and the liability of the stakeholders to the subscribers by reason of their default in running the chit. It follows from the decision of the Full Bench that the claim of the plaintiffs in both the suits out of which these appeals arise must fail in so far as it seeks to make the *mana* liable for the amounts due from the stakeholders as such to the subscribers under the rules governing the conduct of the kuri.

The appellants have, however, endeavoured to establish their case against the defendants, other than the stakeholders, by emphasising the character of the original borrowing by the *mana* of the first year's subscriptions to this kuri amounting to Rs. 12,000. It has been found—and the correctness of the finding has not been seriously canvassed before us—that this kuri was in fact started to finance certain necessary expenditure and to discharge certain binding debts of the *mana*; and we may take it that the sum of Rs. 12,000 which the stakeholders were authorised to draw, representing the first year's subscriptions to the kuri, must be regarded as a borrowing for purposes binding on the *mana*. Under the rules of the kuri the stakeholders should have paid back year by year an amount similar to that due from each of the subscribers. This was an amount of Rs. 600, less a rateable share in Rs. 600 which was treated as interest, less a rateable share in the sum available by reason of the prize-winner—to use a convenient, if not accurate, term—taking the year's prize in auction at a discount. No doubt, since the stakeholders got the whole of the subscriptions at the first instalment, the deductions by way of interest and share in the discount which they were to get in future years cannot properly be regarded as interest on their subscriptions, but must in truth be in the nature of remuneration for the running of the kuri. It follows, then, that, notionally

1. Appeal No 148 of 1940.
2. (1935) 43 L.W. 584.
3. Appeal No. 108 of 1936.

at any rate, the stakeholders as borrowers were under an obligation to pay back Rs. 600 each year in discharge of a borrowing of Rs. 12,000 in the first year and they were entitled to credit to these repayments certain profits which they could claim as remuneration for their work.

The case now put forward on behalf of the plaintiffs is not one which was advanced in the plaint. The plaint simply sought to make the *mana* liable on the ground that the stakeholder was in fact the whole family. That claim fails by reason of the decision of the Full Bench. It is now sought to make the *mana* liable on the ground that it has borrowed Rs. 12,000 from the common fund; it has not been shown that this sum has been repaid in the manner contemplated by the rules; and it can be shown that the payments made to the various subscribers by the stakeholders have in fact been made largely, if not entirely, out of the payments of other subscribers and do not include the regular annual payments which should have been made by the stakeholders themselves out of their *mana* funds. Therefore it is suggested that the unpaid subscribers should be entitled to proceed directly against the *mana* funds to recover the sums which should have been paid to them as subscribers, because their money has been used to discharge liabilities which should have been met out of the *mana* funds.

We find ourselves unable to give effect to this contention in the present proceedings. The true nature of the transaction seems to be this: All the subscribers paid certain amounts annually to the stakeholders. The stakeholders in each year advanced the major portion of the available money to one subscriber who was to repay the advance in the manner contemplated under the rules of the kuri. There was never any direct advance by the general body of the subscribers to any particular borrower. Even at the first instalment although it may be said that Rs. 600 the amount of each subscriber's payment, did in fact go to the defendants' *mana* which may be regarded for this purpose as itself being a specially favoured subscriber there was no advance directly from the general body of subscribers to the defendants' *mana*. The payment was by the general body of subscribers to the stakeholders who in their individual capacity must be deemed to have advanced the money to the *mana*. It therefore follows that any claim based on the failure to repay to the stakeholders the money advanced to the *mana* must in the first instance be made by the stakeholders themselves. No doubt this involves a claim by the stakeholders in their capacity as such, against themselves in their capacity as the persons controlling the *mana*. But in the present suit which is brought only against the stakeholders as such and the *mana* as being itself liable *qua* stakeholder, it seems to us impossible to give a decree against the *mana*, not *qua* stakeholder, but *qua* debtor to the fund administered by the stakeholders.

This, of course, does not mean that the subscribers are left without a remedy. They have got a decree against the surviving stakeholders and the assets of the deceased karnavan. It will be open to them in future proceedings in execution of that decree to claim anything which may be recoverable by the stakeholders from the mana by reason of the indebtedness of the *mana* to the fund; subject of course to any pleas which may be available to the *mana* by way of limitation or otherwise.

A further contention which applies only to such of the defendants as are the sons and the grandsons of the three individuals who originally organised the kuri is based on the claim that they are liable to pay the debts of their father's and grandfather's, as the case may be, under the pious obligation theory. Now it was laid down in *Kunhikutti Ammal* v. *Mallapratu*[1] that a Nambudiri illom differs in many respects from an ordinary joint Hindu family on account of the impartibility of its property and its close resemblance to a Nair tarwad, and that the rule of Hindu law which imposes a duty on a son to pay his father's personal debts, which are neither illegal nor immoral, was not applicable to Nambudiris. Since that

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1. (1913) I.L.R. 38 Mad. 527.

decision was passed, Madras Act XXI of 1933, has considerably altered the law relating to the Nambudiri community. Amongst other provisions this statute recognises that every member of an illom whether male or female, has an equal proprietary interest in its properties and it allows the members of the family, whether male or female, to claim their share by filing a suit for partition. The Act also contains other provisions which alter the existing law as affecting the Nambudiri community. But it is important to remember that this Act does not purport to make applicable those rules of the ordinary Hindu law which did not previously apply to the Nambudiri community except to the extent to which they are specifically made applicable. Section 26 of the Act says :

> "Nothing contained in this Act shall be deemed to affect any law, custom or usage applicable to Nambudiri Brahmins except to the extent expressly laid down in this Act."

It has no doubt been held that the introduction of partibility gives to the creditor of a Nambudiri a right to proceed against the share of his debtor in the family property, which did not exist prior to the passing of this Act. But that is not because of the applicability of any doctrine of Hindu law to the Nambudiri community which did not apply before, but it is an ordinary incident of the creation of a separate estate in each of the coparceners which did not previously exist.

Our attention has been drawn to certain observations of the Bench which decided *Balakrishnan* v. *Chittoor Bank*[1], a case relating to the Ezhava community which in most respects follows the Makkattayam law and not the Marumakattayam law. The Bench held that the sons of this community were liable for the debts of their father not incurred for illegal or immoral purposes, on the ground that they were governed by the ordinary Hindu law except to the extent to which it could be shown that they followed some special custom peculiar to their community. In dealing with the question before them the learned Judges had occasion to refer to the decision in *Kunhikutti Ammal* v. *Mallapratu*[2], which we have just cited and they observed that that decision proceeds on the theory that the Nambudiris have followed the doctrine of corporate ownership of illom property, that there is no question of anybody's share being alienated or seized in execution for the debts either of himself or of his father and that in these circumstances the illom property as a whole can be made liable only for the debts binding on the illom. They go to say :

> "Once, however, it is granted that individual members of the family have separate rights to which they can claim partition of, the reasoning of the above decision will not avail."

It is no doubt true that Sadasiva Aiyar, J., in *Kunhikutti Ammal* v. *Mallapratu*[2] does refer to the impartibility of the property of a Nambudiri illom as one of the reasons for refusing to apply the pious obligation theory to a Nambudiri son. But the learned Judge refers to the other peculiarities of the Nambudiri illom and in distinguishing the case of *Muttayan* v. *Zamindar of Sivagiri*[3] on which reliance was placed as indicating that impartibility and inalienability of the property of the joint Hindu family will not prevent the operation of the rule of Hindu law which makes the sons liable for a father's ordinary debts to the extent of their ancestral property, the learned Judge points out that that case has no relevancy, because the non-liability of a Nambudiri son was not based upon the absence of the incidents of partibility and alienability alone, but upon the illom and its members partaking of the nature of a Marumakattayam tarward as regards the rights of its members in the property. It cannot, therefore, we think be held that the sole *ratio decidendi* of the case in *Kunhikutti Ammal* v. *Mallapratu*[2], is the impartibility which then prevailed in the properties of a Nambudiri illom.

We are, however, constrained to observe that the matter is really governed by section 26 of the Nambudris Act. Clearly it was the intention of that Act to make certain specified changes in the law and usage governing the Nambudiri community and to change nothing which was not expressly embodied in the words

1. (1936) 71 M.L.J. 766.
2. (1913) I.L.R. 38 Mad. 527.
3. (1882) 9 I.A. 128 : I.L.R. 6 Mad. 1 (P.C.).

of the statute. Seeing, therefore, that according to the law and usage of Nambudiris as it stood before Madras Act XXI of 1933 came into force, a Nambudiri son was not liable for the debts of his father under any theory of pious obligation, clearly he cannot have become liable by any implied change of the law under that statute. It follows, therefore, that both of these appeals must be allowed with costs and the decrees must be modified so as to make liable only the first and second defendants and the assets of the deceased Narayanan Nambudiripad in the hands of the other defendants. The appellants will also be entitled to their costs in the Court below.

V.S. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Petiti Kondala Rao .. *Petitioner**.

Defence of India Rules (1939), *rules* 81 (4) *and* 121—*Drugs Control Order* (1943), *Section* 9 (a)—*Contravention of the Drugs Control Order—Conviction of a servant—No provision for such conviction in the case of employees as the rule stood then—Later amendment of Defence Rules—Appeal—Sessions Judge convicting under another rule, that is rule* 121 *neither referred to in the charge nor relied upon by trial Court—Conviction unsustainable.*

The petitioner, a servant, employed in a shop was convicted of an offence under section 9 (*a*) of the Drugs Control Order, 1943 read along with the Defence of India Rules, rule 81 as amended later, on 17th July, 1945, which brought within operation of section 9 of the Drugs Control Order, servants and agents, etc. In appeal, it was held that the case fell within the purview of rule 121 of the Defence of India Rules.

In revision, *held*, that the conviction based upon rule 121 could not stand as the charge against accused did not refer to rule 121 nor did the trial Court base its conviction upon it.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court will be pleased to revise the order of the Court of Session of the Guntur Division dated 21st November, 1945, and made in C. A. No. 147 of 1945 (C.C. No. 10 of 1945, Joint Magistrate, Ongole).

K. Krishnamurthi for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner who was the first accused in the lower Court has been convicted of the offence of contravening the provisions of the Drugs Control Order, 1943. He is alleged to have sold a bottle of Adexelin to P. W. 2 for Rs. 2—12—0 while the control price of the drugs was Rs. 2—6—0. The conviction by the trying magistrate was under section 9 (*a*) of the Drugs Control Order read with rule 81 (4) of the Defence of India Rules. Section 9 (*a*) of the Drugs Control Order refers only to wholesale or retail dealers and not to their servants or clerks. Rule 81 of the Defence of India Rules does not carry the matter further. This rule was amended on 17th July, 1945, so as to bring within the operation of section 9 of the Drugs Control Order, servants or agents, etc. But the fact remains that until 17th July, 1945, persons other than wholesale or retail dealers were not within the purview of the Drugs Control Order. The learned Sessions Judge who heard the appeal against the conviction held that the case fell within the purview of rule 121 of the Defence of India Rules which runs thus:

"Any person who attempts to contravene, or abets or attempts to abet, or does any act preparatory to, a contravention of, any of the provisions of these rules or of any order made thereunder, shall be deemed to have contravened that provision or, as the case may be, that order".

It is to be noted that the trying Magistrate did not invoke the aid of rule 121 of the Defence of India Rules. Nor did he base his conviction on that provision. The charge against the accused does not refer to rule 121 of the Defence of India Rules,

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*Crl.R.C. No. 219 of 1946. 18th July, 1946.
(Crl.R.P. No. 212 of 1946).

and hence the conviction based on that rule obviously cannot stand. In this view it is not necessary to go into the merits of the case although a long argument on the merits was addressed by Mr. Krishnamurthy, the learned Advocate for the petitioner, and if a finding were necessary, I should have had no difficulty in agreeing with the concurrent findings of the Courts below that the first accused sold the drug for a price higher than the control price. The conviction and sentence for the reason mentioned above must however be set aside. The petition is allowed and the fine if paid shall be remitted.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

P. L. Rangiah Chettiar .. *Appellant**

v.

Parthasarathy Iyengar .. *Respondent.*

Indian Contract Act (IX of 1872), section 40—Assignment of contract to sell goods by seller before breach—Right of assignee to sue for damages after breach.

A contract to sell goods was assigned by the seller and the goods were tendered within the due date by the assignee and the defendant committed breach in not accepting delivery and in not paying the price. In a suit for damages by the assignee against the defendant, on a contention that the promisor cannot assign his liabilities under a contract,

Held, that there was nothing personal about such a contract and there was no objection to the seller getting some one else on his behalf to deliver the goods to the buyer and as such, there was equally no objection to his being authorised to file a suit as the seller's deputy or nominee or agent to enforce his rights. It was not a mere right to sue for damages: it was a transfer of the rights under a contract which was still to be performed on both sides—not after it was broken and a claim for damages had arisen.

English and Indian case-law reviewed.

Appeal against the decree of the District Court of Coimbatore in Appeal Suit No. 407 of 1944, preferred against the decree of the Court of the Subordinate Judge of Coimbatore in Original Suit No. 38 of 1942.

The Advocate-General (*K. Rajah Aiyar*) and *V. Seshadri* for Appellant.

V. Govindarajachari and *A. Ramaswami Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—In this second appeal preferred by the defendant, the only question which arises for decision is whether a contract to sell goods could be assigned by the seller so as to enable the assignee to sue for damages for breach of contract on tender of performance by him. Both the Courts held that the goods were tendered within the due date by the assignee and that the defendant committed breach in not accepting delivery and in not paying the price, and that he was therefore liable for damages. They overruled the legal objection.

For the appellant reliance is placed on the general proposition of law that a promisor cannot assign his liabilities under a contract and that a promisee cannot be compelled by the promisor or by a third party to accept anyone but the promisor as the person liable to the promisee. Some of the leading English cases on the subject were cited in this connection, viz., *British Waggon Co.* v. *Lea*[1], *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers*, (1900) v. *Tolhurst*[2], affirmed in 1903 A.C. 414, *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*,[3] *Davies* v. *Collins*[4], as explaining the reason for the rule and as specifying the exceptions ingrafted in it. Reference was also made to *J. H. Tod* v. *Lakshmidas Purushotamdas*[5] and to *Jaffer Meher Ali* v. *Budge-Budge Jute Mills, Co.*[6]

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* S. A. No. 1457 of 1945. 29th July, 1946.

1. (1879-80) 5 Q.B.D. 149.
2. (1902) 2 K.B. 660.
3. 1940 A.C. 1014.
4. 1945 All.E.R. 247.
5. (1892) I.L.R. 16 Bom. 441.
6. (1906) I.L.R. 33 Cal. 702.

Section 40 of the Indian Contract Act is in these terms :

"If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it."

It is obvious that there is nothing personal about such a contract as this. The only objection raised against the assignment is that the seller is under an obligation to deliver the goods and that he cannot compel the purchaser to look to another man for the discharge of his obligation. So is a buyer under an obligation to pay the price. The buyer's right under the contract to get the goods on payment of the price has been held to be capable of assignment because it falls within the definition of an actionable claim. See *Jaffer Meher Ali* v. *Budge-Budge Jute Mills, Co.*,[1] affirmed in *Jaffer Meher Ali* v. *Budge-Budge Jute Mills Co.*,[2] also *Hansraj* v. *Nathoo*[3]. It is difficult to see any distinction in principle between the buyer's right and the seller's right on the subject of assignment. The buyer is under an obligation to pay the price before he can ask for the delivery of the goods ; the seller is under an obligation to deliver the goods before he can ask for payment of the price. The one right is as much an actionable claim as the other and if this is correct, the transfer is permitted. Such difficulty as exists has been got over in some of the English cases by taking the view that the very nature of the contract might show that it was not intended that the party should personally perform their obligations or that it was within their contemplation that what was undertaken by a party could be got done by him by a deputy or nominee. As was done in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers* (1900) v. *Tolhurst*[4], we can hold, without doing any violence to the intention of the parties, that the suit contract is one which must have been contemplated by them as capable of being performed on both sides by their assigns or representatives. In Leake on Contracts (8th edition) there is this passage at page 905, supported by the authority of *British Waggon Co.* v. *Lea*[5], and *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers*, (1900) v. *Tolhurst*[4] :

"But a contract that certain acts shall be done or goods supplied, without regard to the persons engaged, is assignable ; and upon performance of all the conditions stipulated for, the assignee is entitled to the benefit of the contract . . . . . ."

There is this note to be found in Pollock and Mulla's Contract Act (7th edition) at page 249, that it was yet to be decided whether the right of the seller to call for payment of price on delivery of goods is an actionable claim and as such assignable. Mr. Govindarajachari the learned Advocate for the respondent was able to refer to the decision in *Dayabhai Dipchand* v. *Dulabhram Dayaram*[6] of Westropp, C.J., and another Judge as upholding an assignment of his shares by a seller of his rights under a contract.

If there is no objection to the seller getting some one else on his behalf to deliver the goods to the buyer, there is equally no objection to his being authorised to file a suit as the seller's deputy or nominee or agent to enforce his rights. It is not a transfer of a mere right to sue for damages : it is a transfer of the rights under a contract which is still to be performed on both sides—not after it was broken and a claim for damages has arisen.

It is well-known that such contracts are being assigned every day in the market in Madras ; to recognise or give effect to the argument for the appellant would be to upset this wide spread practice which can be said to have grown almost into a commercial usage.

The second appeal is dismissed with costs.

(No leave).

V.P.S. ——— *Appeal dismissed.*

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1. (1906) I.L.R. 33 Cal. 702.
2. (1906) I.L.R. 34 Cal. 289.
3. (1907) I.L.R. 9 Bom.L.R. 838.
4. 1903 A.C. 414.
5. (1879-80) 5 Q.B.D. 149.
6. (1871) 8 Bom.H.C.R. (A.C.J.) 133.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Nagalingam and another .. *Petitioners**.

Defence of India Act (1939), *section* 2 (3) (ii) *and Defence of India Rules* (1939), *Rule* 121—*Rule* 121 *if* ultra vires *the Central Government.*

On a contention that rule 121 of the Defence of India Rules was *ultra vires* the Central Government in that as section 2 (3) (*ii*) of the Defence of India Act did not make preparation for the commission of an offence, an offence, the Central Government had no power to include in rule 121 the statement that a person who does any act preparatory to the contravention of the rules shall be deemed to have contravened the rules,

Held, if sub-section (3) of section 2 of the Act stood alone there might be force in this contention ; but sub-section (3) does not detract from the very wide powers given to the Central Government by sub-section (1). Further, the provisions of sub-section (2) are without prejudice to the generality of the powers conferred by sub-section (1) and sub-section (3) says that the rules "may further provide." The wide powers of sub-section (1) are not restricted by what follows. Rule 121 is a rule made under section 2 (1) of the Defence of India Act and is within the powers conferred upon the Central Government by that clause. The fact that sub-section (3) of section 2 of the Act does not contain any reference to preparation does not affect the validity of rule 121.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of the Madura division dated 29th October, 1945, and passed in C. A. Nos. 213 and 214 of 1945, preferred against the judgment of the Court of the City First Class Magistrate of Madura dated 19th September, 1945, and passed in C. C. No. 49 of 1945.

N. Somasundaram and *P. Rajamanickam* for Petitioner in both.

The Advocate-General (*K. Rajah Aiyar*) and the Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Order of the Court was made by

The Chief Justice.—These two petitions may be dealt with together. The petitioner in Criminal Revision Case No. 88 of 1946 is the husband of the petitioner in Crl. R. C. No. 89 of 1946. They were convicted by the City First Class Magistrate of Madura of having committed an offence under rule 90-B (2) read with rule 121 of the Defence of India Rules and each was fined Rs. 1,000. They appealed to the Sessions Judge of Madura who by an order dated the 29th October, 1945, dismissed their appeals. This Court is asked to set aside the convictions under its revisional powers because it is said the rules under which the accused were convicted are *ultra vires* the Central Government.

The accused are residents of Jaffna. In the month of December, 1944 they visited Madura, where during that month and the month of January, 1945 they purchased gold which they had made into small cylindrical blocks. The case against them was that they had bought the gold and had it made into ingots in preparation for export to Ceylon, an offence under rule 90-B (2). The facts are not in dispute. The only question which the Court is called upon to decide is whether the rules referred to are within the rule-making power of the Central Government.

Rule 90-B (2) states that no person shall, except with the permission of the Reserve Bank of India or of a person authorised in this behalf by the Bank, take or send out of British India money in excess of such amount as may be specified by the Bank or any gold. Rule 121 provides that a person who attempts to contravene or abets, or attempts to abet, or does any act preparatory to a contravention of any of the provisions of the Defence of India Rules or of any order made thereunder, shall be deemed to have contravened that provision or, as the case may be, that order. Rule 90-B (3) provides the punishment which may be inflicted for the wrongful export of money or gold.

* Cr. R. C. Nos. 88 and 89 of 1946. (Cr. R. P. No. 85 and 86 of 1946). 19th September, 1946.

The case for the accused is based on the wording of section 2 (3) of the Defence of India Act. Sub-section (1) of that section says that the Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community. Sub-section (2) says that without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, or may empower any authority to make orders providing for, all or any of the matters enumerated in the sub-section. Sub-section (3) says that the rules made under sub-section (1) may make further provisions which are specified. Sub-section (3) (*ii*) reads as follows :

> "The rules made under sub-section (1) may further provide that any contravention of, or any attempt to contravene, and any abetment of, or attempt to abet, the contravention of any of the provisions of the rules, or any order issued under any such provision, shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both."

The learned counsel for the accused says that as this clause does not make the preparation for the commission of an offence, an offence, the Central Government had no power to include in Rule 121 the statement that a person who does an act preparatory to the contravention of the rules shall be deemed to have contravened the rules. If sub-section (3) of section 2 of the Act stood alone, there might be force in this argument ; but sub-section (3) does not detract from the very wide powers given to the Central Government by sub-section (1). As we have already pointed out, the provisions of sub-section (2) are without prejudice to the generality of the powers conferred by sub-section (1) and sub-section (3) says that the rules "may further provide".

In *King-Emperor* v. *Sibnath Banerji*[1], the Privy Council said :

> "the function of sub-section (2) is merely an illustrative one ; the rule making power is conferred by sub-section (1) and "the rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as indeed, is expressly stated by the words 'without prejudice to the generality of the powers conferred by sub-section (1)'."

If sub-section (2) is not restrictive of the powers, sub-section (3) cannot be. In the clearest terms the Judicial Committee has stated that the wide powers of sub-section (1) are not restricted by what follows.

Rule 121 is a rule made under section 2 (1) of the Act and is within the powers conferred upon the Central Government by that clause. The accused were preparing to contravene the Act. The fact that sub-section (3) of section 2 does not contain any reference to preparation does not affect the validity of rule 121. The case was rightly decided by the Courts below and the petitions must be dismissed.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDARAJACHARI.

Picha Mooppanar .. *Appellant**

v.

Velu Pillai and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 53—Hindu joint family—Unequal partition with intent to defeat father's creditors—Right of creditors to ignore such partition and proceed in execution against proper share which ought to have been allotted to the father—Fraudulent character of partition—Test.

If a partition between a Hindu father and his sons is unequal and the father is allotted a smaller share than would be his due with intent to defeat the creditors, the latter can avoid the partition under section 53 of the Transfer of Property Act and proceed against what would be the father's proper share in the family properties in execution of the decree against him ignoring the allotment of the properties at the partition.

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1. (1945) F.C.R. 195 at p. 214 (P.C.) : 1945 F.L.J. 222 : (1945) 2 M.L.J. 325 (P.C.).

* S. A. No. 1023 of 1945. 6th September, 1946.

K. S. RM. Firm v. *Subbiah,* (1944) 1 M.L.J. 384 : I.L.R. 1945 Mad. 138 relied on.

Where by a partition no property was allotted to the father and only a small provision was made for his maintenance and all the properties were allotted to the sons, the partition must be held to be a fraudulent one. The fact that the debts of the father are mentioned in the partition deed and the sons are directed to discharge respective shares of the debts cannot affect the creditors and render the partition deed not fraudulent. The proper test is to see whether sufficient property was allotted to the father with which he could discharge his debts and not to see whether the properties allotted to the sons were sufficient to discharge the debts of their father which they had undertaken to discharge. The creditors not being parties to the contract embodied in the partition deed cannot take advantage of it and enforce the arrangement against the sons.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A.S. No. 216 of 1944 preferred against the decree of the Court of the District Munsiff of Ambasamudram in O.S. No. 209 of 1943.

T. L. Venkatarama Aiyar and *G. R. Jagadisan* for Appellant.

K. Venkateswaran for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in this second appeal filed Small Cause Suit No. 644 of 1940 in the Court of the District Munsiff of Ambasamudram against one Krishna Pillai on a promissory note executed by him and obtained a decree. The appellant sought to execute his decree by attaching the properties set out in the schedule appended to the present plaint. The first defendant in this suit who is the first respondent in the second appeal filed a claim petition objecting to the attachment on the ground that the suit property fell to his share in a family partition entered into between Krishna Pillai his father, himself and his brother Arumugham Pillai who is the second defendant in the present suit and the second respondent in the second appeal. The claim petition was allowed and the attachment was raised. The appellant thereupon filed the suit out of which this second appeal has arisen alleging that the partition relied upon by the first defendant was entered into with intent to defraud the creditors of Krishna Pillai. The suit was filed by the plaintiff on behalf of himself and the other creditors of Krishna Pillai. No objection to the frame of the suit can therefore be taken and if the plaintiff establishes that the partition was fraudulent as he alleged, he would be entitled to relief to the extent stated below. The District Munsiff of Ambassamudram who tried the present suit dismissed it holding that the plaintiff did not succeed in making out that the partition in question was in fraud of the creditors of Krishna Pillai. This judgment was affirmed by the Subordinate Judge of Tinnevelly.

In this second appeal filed by the plaintiff his advocate Mr. T. L. Venkatarama Aiyar has argued that the findings of the Courts below in regard to the character of the partition cannot be sustained as the matter was not viewed from the proper legal standpoint by either Court. He contends that according to the latest pronouncement of our Court in the case in *K. S. RM. Firm* v. *Subbiah*[1] :

> "If a partition is unequal and the father is allotted a smaller share than would be his due with intent to defeat the creditors, the latter can avoid the partition under section 53 of the Transfer of Property Act and proceed against what would be his proper share in the family properties in execution of the decree obtained against him ignoring the allotment of the properties at the partition."

Whatever doubts might have existed in regard to the complicated positions which arise in cases where partitions are effected between a Hindu father and his sons at a time when the father is indebted, all those doubts must, in my opinion, be said to have been cleared by the decision I have just referred to. If I may say so with respect, the enunciation of the law by Wadsworth and Patanjali Sastri, JJ., in that decision in the form of certain propositions of law has elucidated and defined the rights of creditors as against their debtors and their sons. That decision fully supports the contention raised on behalf of the appellant. The particular proposition on which Mr. Venkatarama Ayyar relies is set down as paragraph (*a*) on page 146 in the I.L.R. Vol. It is unnecessary to set it out here, as I have already indicated its scope and effect.

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1. (1944) 1 M.L.J. 384 : I.L.R. 1945 Mad. 138.

So far as the findings of the Courts below are concerned, it seems to me that both Courts failed to look at the transaction from the proper legal standpoint. The question which they should have put to themselves is whether sufficient property was allotted to the father with which he could discharge his debts. The manner in which the Courts below viewed the matter is this. They asked themselves whether the property that was allotted to the first defendant was sufficient for the discharge of the debts which he had undertaken to discharge and similarly with regard to the second defendant also. Putting this question to themselves, they held that the debts which each of the defendants was called upon or had undertaken to discharge were less than the properties which had been allotted to each of them. This misses the real point altogether. Looking at the question from the standpoint I have indicated, I have no doubt in my mind that the partition evidenced by Ex. D-1 must be held to be a fraudulent partition within the meaning of proposition (*a*) enunciated by Wadsworth and Patanjali Sastri, JJ., in the case already referred to. It is unnecessary to set out at length the terms of the partition deed. No property was allotted to the father, as small provision for his maintenance was made, each of the sons being directed to deliver to him a small quantity of paddy every year and make a small cash payment. A similar provision was also made for the maintenance of the mother. All the properties were divided between first and second defendants. It is true that all the debts of the father were distributed between the first and second defendants, the second defendant being directed to pay something more than half the debts, the inequality being explained by the fact that the second defendant took a house which was slightly larger in value than the house which was allotted to the first defendant. While the debts of the father were mentioned in the partition deed and while the first defendant or the second defendant was directed to pay them off, it seems to me that this provision is absolutely illusory as no creditor can take advantage of what is binding only as between the first and second defendants. Creditors are not parties to the contract embodied in the partition deed and if the concerned defendant refuses to discharge a debt which he is directed to pay under Ex. D-1, I do not see how he can be compelled at the instance of the creditor to discharge it by reason of the fact that the debt is by the partition deed directed to be paid by that defendant. In deciding whether the partition is not fraudulent in the sense I have indicated, we have only got to look at the effect which this partition deed would have on the rights of creditors and so viewed the partition must be held to have been entered into with a view to defraud the creditors of Krishna Pillai. Mr. Venkateswara Aiyar the advocate for the first respondent argued that the propositions enunciated by Wadsworth and Patanjali Sastri, JJ., are *obiter dicta* as there is a finding recorded by them lower down in their judgment that the partition which was effected in that case was not unequal. I am not sure that they are *obiter* but even so, I am inclined to agree with those observations which, as I already stated, not only state precisely the legal position which arises in cases of this description, but also give the necessary protection to creditors against fraudulent partitions.

It is not denied that the debt in question in the present case is a pre-partition debt and would be binding on the sons. The first defendant who is the contesting defendant neither alleged nor proved that the debt is illegal or immoral and consequently not binding on him.

Mr. Venkateswara Aiyar further argued that the findings of the Courts below are findings of fact. I cannot agree. If the proper test had been applied, I would certainly not have interfered with their findings, sitting as I am, in second appeal. But when the real point is missed and the entire discussion proceeds upon what I consider to be an altogether wrong basis, I do not regard the findings as binding on this Court in second appeal.

Another point was raised by Mr. Venkatarama Aiyar as an alternative to his principal argument. He contended that defendants 1 and 2 are universal donees within the meaning of section 128 of the Transfer of Property Act and that

they would be consequently liable to discharge the debts of the father whom he describes as the donor. This point was not raised in either of the Courts below, but apart from that I am not impressed with the argument that the transaction evidenced by Ex. D-1 the partition deed is or can be treated as a gift of the entire property by Krishna Pillai in favour of his sons which is how Mr. Venkatarama Aiyar would view the transaction. In the first place, the first defendant is given some properties and is directed to discharge certain debts, while the second defendant takes some other properties and undertakes to discharge certain other debts which means that if they are gifts at all, there are two gifts and not one, of two separate portions of the property. There is again the difficulty that there can be nothing like a gift of joint family property by a Hindu father in favour of his undivided sons. There can be a renunciation by him of his interest in favour of the other members of the family, but that may not be a gift within the meaning of the Transfer of Property Act. It is however unnecessary to pursue this discussion any further as I accept Mr. Venkatarama Aiyar's argument on the main point which I have already dealt with.

The result is that the second appeal is allowed and the suit is decreed to the extent that the plaintiff and the other creditors of Krishna Pillai can proceed in execution of his or their decrees only against the father's one-third share in the family properties. As regards costs, I direct each party to bear his own costs throughout, because it seems to me that the plaintiff brought all this trouble on himself and others by not suing the sons also, notwithstanding that he knew of the partition which had been entered into between the father and the sons and also because there is every reason to suspect that the plaintiff is unwilling to proceed against the properties allotted to the second defendant though the second defendant was directed to discharge the plaintiff's debt by the partition deed. While these considerations would not deprive the plaintiff of what are his rights in law, I regard them as sufficient to justify an order disallowing his costs throughout. It is no doubt a pity that the second defendant who should have discharged this debt as he had undertaken to do by Ex. D-1 did not do so and that the first defendant is therefore now compelled to discharge it. But that is a matter which may arise hereafter as between the first and second defendants and it is unnecessary for me to say anything further about it in this appeal.

(Leave refused).

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Polisetti Govinda Rao of Ellore .. *Petitioner.**

Factories Act (XXV of 1934), sections 63 *and* 71—*Charge of obstruction of Additional Inspector of Factories from entering factory premises—Onus.*

Where the manager of a factory is charged with having obstructed the Additional Inspector of Factories from entering the factory premises, no claim can be made under section 71 of the Factories Act throwing the burden on the accused to show that any other person obstructed because section 63 clearly indicates that there must be wilful obstruction. In the absence of evidence to show that the accused was present and obstructed, he cannot be convicted.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate of Ellore, dated 11th September, 1945 and passed in C.C. No. 57 of 1945.

T. Ramamurti for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

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*Crl.R.C. No. 74 of 1946.
(Crl.R.P. No. 71 of 1946). 17th April, 1946.

The Court made the following

ORDER.—This is a case in which the manager of the factory has been convicted and sentenced to pay a fine of Rs. 50 for having obstructed the Additional Inspector of Factories from entering the factory premises. My attention is not drawn to any evidence to indicate that the petitioner himself obstructed or that he asked any others to obstruct. No claim can be made under section 71 of the Indian Factories Act throwing the burden on the petitioner to show that any other person obstructed, because section 63 clearly indicates that there must be a wilful obstruction. If it was wilful obstruction then the petitioner himself must have been present and obstructed. Since there is no evidence to show that he obstructed, the petitioner has to be acquitted. The conviction and sentence are accordingly set aside and the petitioner is acquitted.

V.S. *Conviction set aside.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras).

PRESENT :—LORD SIMONDS, MR. M. R. JAYAKAR AND SIR JOHN BEAUMONT.

Sellamani Ammal .. *Appellant**

v.

Thillai Ammal and another .. *Respondents.*

Hindu Law—Joint family—Son succeeding to property of adoptive mother—Nature of estate taken—Validity of will in respect of such property—Blending with ancestral estate—Proof of—Practice—Official translation—Departure from—Justification.

The testator inherited certain property from his adoptive mother who had inherited it from her father's father. He made a will on 23rd September, 1916, five days before his death and at that time had four children, namely, two sons *N* and *S* aged 16 and 9 respectively and two unmarried daughters *T* and *S* aged 13 and 7 respectively. It provided among other things that "The said guardians shall, with the permission of the *mel-vicharanaikars* (supervisors) not only perform the marriages of the minor girls, defraying expenses to the extent of rupees two thousand for each girl but shall also give to each girl lands worth rupees five thousand or (rupees five thousand) in cash, and after the family debts are discharged, shall also give to the minor girls with the consent of the *mel-vicharanaikars*, rupees three thousand worth of jewels out of the family funds apart from jewels which I have made and given to them. Until minor Nataraja Pillai completes his twenty-first year, the guardian and *mel-viacharanaikars* shall act in the aforesaid manner, and deliver the properties to the said Nataraja Pillai along with accounts upto the 30th September, 1921. If at the time when the said Nataraja Pillai takes charge of the properties, the amounts mentioned in this will or any portion thereof remain unpaid to the said girls, he shall pay to each of them the amount due to her. If he fails so to give each of them shall recover the amount on the liability of the A schedule properties." *N* died on 24th June, 1918 and *S* attained the age of 21 in 1926 and died in 1929 leaving his widow surviving him. As the daughters though married had not been given either land of the value of rupees five thousand or cash of that amount they filed suits in 1933 claiming a right to the legacy of rupees five thousand and payment of it with interest. It was contended in defence that the testator had so blended his own estate with his ancestral estate that it was not in his power to give the legacies to his daughters.

Held, that property in the possession of the testator so far as they came from his adoptive mother were not ancestral or joint family property and neither from his mode of dealing during his lifetime with that property (which was beyond question originally his separate estate) nor from his testamentary disposition can the inference be fairly drawn that the testator waived or surrendered his special right in it as separate property.

It is not legitimate for the Court to depart from the official translation except upon expert evidence which the parties should have an opportunity of testing.

R. Ritson with *M. S. Venkatarama Iyer* (Madras) for Appellant.

Respondent not represented.

Their Lordships' Judgment was delivered by

LORD SIMONDS.—This appeal which is brought from a judgment and decree of the High Court of Judicature at Madras reversing in part the judgment and decree of the Subordinate Judge of Trichinopoly raises a question of some difficulty

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* P. C. Appeal No. 67 of 1944. 30th July, 1946.

arising under the will of Subbaraya Pillai who died on the 28th September, 1916, and will be hereafter called the testator.

Some facts concerning the testator's family must first be given. He was the adopted son of Sabhapathi Pillai of Achalpuram in the Tanjore district and Swarnathammal, his wife, who had no other children. Swarnathammal was the daughter of Kandaswami Pillai who was the son of Thiruvarasu Pillai. The latter was the owner of an estate known as the Kudapalli Estate in the Trichinopoly District. Kandaswami predeceasing his father, upon the death of the latter this estate descended to Swarnathammal who managed it until her death in 1904 or 1905. She was succeeded in the estate by the testator who managed it until his death in 1916. Sabhapathi had in the meantime died having in the year 1884 executed a will which he described as an arrangement of his family affairs. In it he recited that all the acquisitions made by him were made with the moneys belonging to his wife Swarnathammal and gave her a life estate therein.

On the 23rd September, 1916, five days before his death the testator made his will. He had at that time four children, namely, two sons, Nataraja aged 16, and Sabhapathi aged 9, and two unmarried daughters Thillai aged 13 and Swarnathammal aged 7.

By his will the testator appointed his two elder brothers Kuppuswami Pillai and Muthu Pillai as guardians of his family properties and charity properties and the minor children, with directions to keep accounts of the receipts and disbursements. In order to keep a check on the said guardians he appointed as *mel-vicharanaikars* (supervisors) M. Sundaram Pillai Avargal and V.A. Arunachalam Chettiar Avargal, and after a direction to pay his debts, and to keep proper accounts, proceeded as follows:

"The said guardians shall, with the permission of the *mel-vicharanaikars* (supervisors) not only perform the marriages of the minor girls, defraying expenses to the extent of rupees two thousand for each girl but shall also give to each girl lands worth rupees five thousand or (rupees five thousand) in cash, and after the family debts are discharged, shall also give to the minor girls with the consent of the *mel-vicharanaikars*, rupees three thousand worth of jewels out of the family funds apart from the jewels which I have made and given to them. Until minor Nataraja Pillai completes his twenty-first year, the guardian and the *mel-vicharanaikars* shall act in the aforesaid manner and deliver the properties to the said Nataraja Pillai along with accounts up to the 30th September, 1921. If at the time when the said Nataraja Pillai takes charge of the properties, the amounts mentioned in this will or any portion thereof remain unpaid to the said girls, he shall pay to each of them the amount due to her. If he fails so to give, each of them shall recover the amount on the liability of the A schedule properties."

The daughter Thillai was married to Ammal (?) on the 1st June, 1919. The expenses of the marriage were met by Nataraja Pillai, who had also given her some jewels. She is a respondent to this appeal.

Nataraja Pillai died on the 24th June, 1919, and was survived by his minor brother Sabhapathi Pillai. On the 18th December, 1919, the Court of Wards was appointed to take up the management of the Kudapalli Estate.

Sabhapathi Pillai attained the age of eighteen years in 1923, and attained the age of twenty-one years in 1926. He died in June, 1929, leaving the appellant as his widow him surviving.

Neither land of the value of rupees five thousand nor cash of that amount having been paid to Thillai, on the 1st December, 1933, she commenced a suit against the appellant and the Manager, Court of Wards, Kundapalli Estate, Trichinopoly and Swarnathammal claiming a right to the legacy of rupees five thousand and payment of it with interest. At about the same time her sister Swarnathammal who is the second respondent to this appeal commenced a suit against the same first two defendants and Thillai as third defendant claiming the same relief.

In these suits two substantial questions arose for decision which were intended to be covered by the issues framed in them, *viz.*:

1. Whether the testator had so blended his own estate with his ancestral estate that it was not in his power to give legacies of rupees five thousand to his daughters.

2. Whether in any case the suits were barred by limitation, a question that only arose if the first question was answered in the negative.

The learned Subordinate Judge answered this first question in the affirmative. He came to the conclusion that the whole of the properties in the possession of the testator at his death, *i.e.*, as well the Kudapalli estate belonging to his mother to which he had succeeded on her death as his ancestral Achalpuram estate, were joint family properties. If so, the legacies in question were not validly given. The learned Judge appears to have thought that the Kudapalli estate from the moment that the testator succeeded to it became part of the joint family property but further held on this evidence that, even if this was not so, he had so blended the two estates that he had converted the Kudapalli estate into joint family property.

On the second question to which their Lordships will return, the learned Judge held that the suits were barred by limitation, 12 years having elapsed since the 30th September, 1921, the date on which Nataraja would have attained the age of 21. He accordingly dismissed the suits.

From this decision the respondent Thillai Ammal appealed to the High Court of Judicature at Madras. During the pendency of the appeal the Court of Wards relinquished the estate. On the 11th March, 1942, the High Court gave judgment allowing the appeal. They were of opinion that the properties in the possession of the testator so far as they came from his mother Swarnathammal were not ancestral or joint family properties and had not been so blended with his ancestral estate as to become the joint family properties of himself and his two sons. Upon the question of limitation also the learned Judges of the High Court allowed the appeal but they did so only because they did not accept as accurate the official translation of the testator's will. To this matter their Lordships will refer later.

Upon the first question their Lordships are clearly of opinion that the decision of the High Court was right. They do not think it necessary to rehearse the principles of law applicable which have been recently expounded by the Board (see *e.g.*, *Nutbehari Das* v. *Nanilal Das*[1], and it appears to them that the High Court has rightly applied these principles to the facts of the present case. Neither from his mode of dealing during his lifetime with the Kudapalli estate (which, in their Lordships' opinion, was beyond question originally his separate estate) nor from his testamentary disposition can the inference be fairly drawn that the testator waived or surrendered his special right in it as separate property. Their Lordships find in the careful examination by the High Court of all the relevant facts and documents a conclusive refutation of the plea advanced by the present appellant and will not repeat it.

Upon the second question the position is one of serious difficulty. The official translation of the will was accepted without question in the Court of the Subordinate Judge, nor, so far as their Lordships are informed, was it challenged by either of the parties before the High Court. And as their Lordships understand the judgment of the High Court, the learned Judges of that Court would not, if the official translation was correct, have differed on the question of limitation from the Subordinate Judge. They would have held that, twelve years having elapsed after the 30th September, 1921, before the suits were instituted, the claims to legacies of rupees five thousand were barred. Nor do their Lordships see any sufficient reason or differing from this conclusion. But the High Court have on this point taken a course which cannot be supported. They have formed the opinion that in an important respect the official translation is incorrect and have corrected it by making the words "after the debts of the family are discharged" qualify the payment of the legacies of rupees five thousand. And having made this correction and having further found as a fact that the debts of the family have not yet been discharged, they have concluded that the legacies have not become payable and that the claims to recover them are not barred. Their Lordships would once more express the view (see *Sasiman* v. *Shib Narayan*[2] and *Rajendra Prasad Bose* v. *Gopal Prasad Sen*[3])

1. (1937) 2 M.L.J. 114 (P.C.).
2. (1921) 42 M.L.J. 492 : L.R. 49 I.A. 25 : I.L.R. 1 Pat. 305 (P.C.).
3. (1930) 59 M.L.J. 615 : L.R. 57 I.A. 296 (P.C.).

that it is not legitimate for the Court to depart from the official translation except upon expert evidence which the parties should have an opportunity of testing. They, therefore, cannot accept as valid the reason and the only reason given by the High Court for reversing the decision of the Subordinate Judge on this point. At the same time their Lordships cannot ignore the opinion expressed by the experienced Judges of the High Court upon such a matter; they cannot treat as irrecoverable legacies which appear to be recoverable if the translation given by the High Court is correct. There appears, therefore, to be no other course open to them than to remit the matter to the High Court with directions to give the present appellant the opportunity of challenging by expert evidence the translation of the will which has been substituted for the official translation. If the substituted translation is then accepted, the appellant must fail. If, on the other hand, the official translation is upheld, there appears to be no doubt that the appellant is entitled to succeed on the question of limitation. In the special circumstances of this case, their Lordships do not think that any costs should be awarded and they will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Messrs. Douglas Grant and Dold.*

Respondents unrepresented.

V.S. *Case remitted to High Court.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Patna).*

PRESENT :—LORD SIMONDS, MR. M. R. JAYAKAR AND SIR JOHN BEAUMONT.

Chhaterpati Pratap Bahadur Sahi and others .. *Appellants*†

v.

Lachmidhar Prasad Singh and others .. *Respondents.*

Hindu Law—Stridhan—Mitakshara—Benares school—Succession beyond heirs specially enumerated in the texts—Test of funeral oblations as a test of preference—Applicability where the rival claimants are a binnagotra sapinda and a sagotra sapinda.

No special rules relate to the succession to a maiden's property beyond the heirs specially enumerated in the several texts and such succession is governed by the rules which relate to the succession of a woman in an unapproved form, the reason apparently being that in both cases the woman is free from the *patria potestas* of the husband, in one case because she is unmarried, and, in the other, owing to the inferior form of marriage, in which the husband's dominion over her is not as complete as in the case of marriages in the so called approved forms. In default of husband in the case of a woman married in the approved form and in default of father in other cases, the heirs of husband or father succeed in the order laid down in Yagnavalkya's text (Ch. II, verses 135, 136) relating to the succession to the property of a male. The said text has been accepted by text writers as providing the general rule prescribing the order of succession in all cases of separate property. In the absence of any text or judicial decision abrogating the value of the text of Yagnavalkya in Stridhan cases it must be taken that it applies to cases of stridhan property. Further, the effect of judicial decisions has been to establish that it is now a well-accepted rule that the text of Yagnavalkya also governs succession to stridhan property in the same order of succession as is mentioned in the text. In the face of the textual authorities and the concurrence of the Mitakshara, the Viramitrodaya and Kamalakara and the judicial decisions, there is not much scope for the argument that the stridhan heirs of a maiden are different from the heirs of her father, or that these heirs are not the same as those enumerated in the text of Yagnavalkya. If so, it is clear that bhandus (binnagotra) would be excluded by gotrajas.

The test of funeral oblations as a test of preference is inapplicable where the rival claimants do not belong to the same class of sapindas, one being a binnagotra sapinda and the other a sagotra sapinda.

Sir Thomas Strangman, K.C., V. Sen Gupta and *J. M. R. Jayakar* for Appellants.

J. M. Pringle, K.C., B. W. Ramsay, J. D. Caswell, K.C., R. K. Handoo, Khaleel Ahmad and *P. Parrikh* for Respondents.

Their Lordships' Judgment was delivered by

M. R. JAYAKAR.—These are two consolidated appeals from a judgment and two decrees of the High Court of Judicature at Patna,* dated 9th May, 1939,

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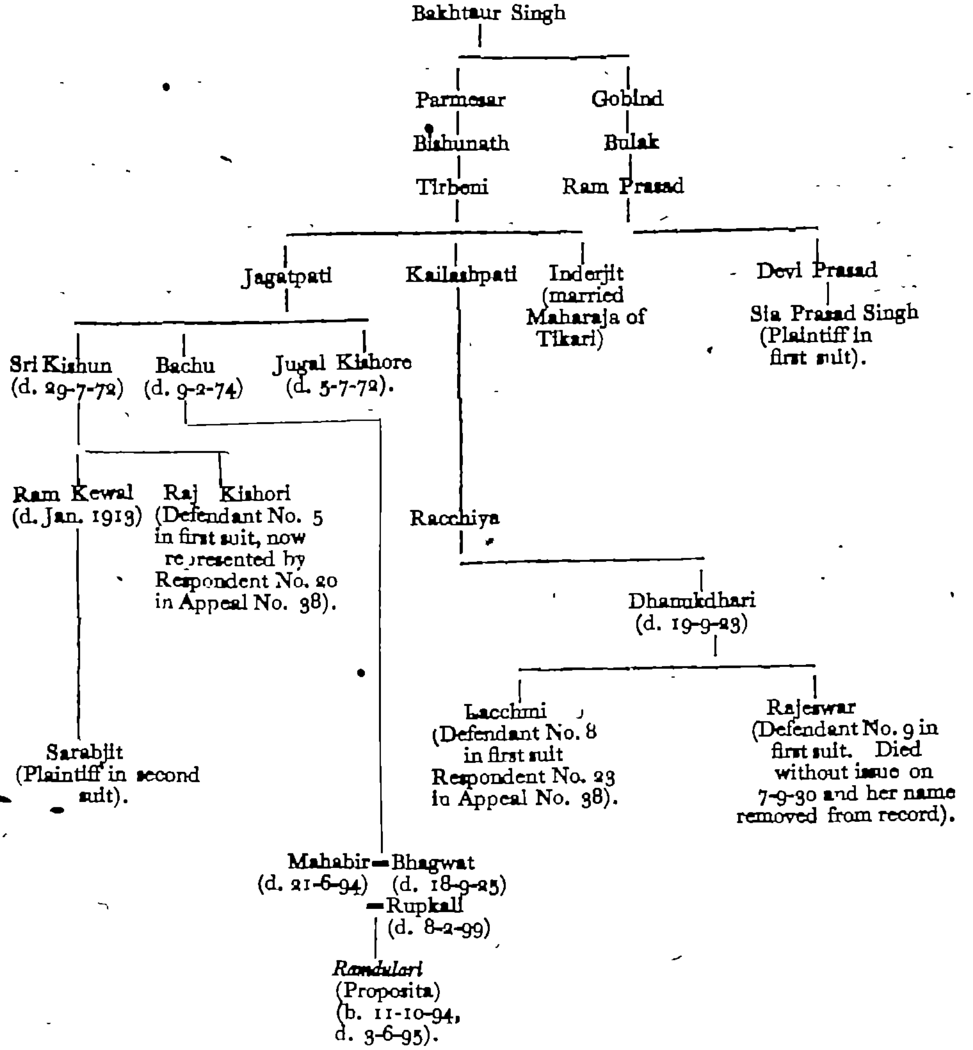
* (1939) I.L.R. 18 Pat. 590.

† P. C. Appeal No. 53 of 1943. 29th July, 1946.

confirming a judgment and two decrees of the Subordinate Judge of Gaya, dated 5th June, 1934.

The family with which this litigation is concerned is governed by the Benares School of the Mitakshara school of Hindu Law. It consists of two branches which have been settled for many years at Rusi and Kaira respectively. The annexed pedigree of the family is taken from one which was proved to the satisfaction of the trial Court and was undisputed in the High Court.



The only question in these appeals is whether Sarabjit (a near cognate or bandhu) or Sia Prasad Singh (a more remote agnate or gotraja) was entitled to the property left by Ram Dulari Koer. Both Courts in India have held that Sia Prasad Singh was so entitled.

The facts, out of which these appeals arise, briefly stated, are as follows :—

Jagatpati and Kailashpati were joint. They had a married sister Inderjit Koer. The two brothers died, and in December, 1863, Jagatpati's branch was represented by three sons, Sri Kishun, Bachu and Jugal Kishore, while Kailashpati's branch was represented by a son Ram Racchiya. On 9th December, 1863, by two pattas, Inderjit Koer made a grant to Bachu of an estate consisting of a number

of villages, hereinafter referred to as the Lakhaipur Estate. Bachu, at the time, was joint with his two brothers and Ram Racchiya. A separation between them took place on 31st December, 1864. It was the appellant's case in the trial Court that the grant of the Lakhaipur Estate was made to Bachu on behalf of himself and his two brothers. The trial Court held that it belonged to Bachu alone, and this decision is not now disputed.

In July, 1872, Jugal Kishore and Sri Kishun died. In September, 1873, Bachu dedicated six villages out of the Lakhaipur Estate to a temple established by him. In 1874 Bachu died and was succeeded by Mahabir, his only son. Mahabir came to an agreement with Anandi Koer, widow of Jugal Kishore, who claimed that her husband had been joint with Bachu. By the said agreement she relinquished her estate in Bachu's favour in consideration of a maintenance grant. Bachu also came to terms with Ram Kewal Koer, a daughter of Sri Kishun, who had filed a suit against him and her sister Raj Kishori, claiming certain property, on the footing that her father had been separated from his two brothers.

Under the terms arrived at with Ram Kewal Koer, Mahabir transferred certain villages to her in full satisfaction of her claim. Mahabir also alienated six villages out of the Lakhaipur Estate to the temple. He died on 21st June, 1894, leaving two widows, Bhagwat Koer and Rupkali Koer. On 11th October, 1894, Rupkali gave birth to a daughter Ramdulari Koer, who died on 3rd June, 1895.

At the time of his death, Mahabir was possessed of the Lakhaipur Estate (less the villages alienated by his father and himself as stated above). He also possessed other properties. Mahabir left a will dated 26th September, 1893, probate whereof was obtained by his widows on 5th January, 1895. The material provisions of the will are set forth in a judgment of this Board, reported in *Bhagwat Koer* v. *Dhanukhdhari Prashad Singh*[1]. The true date of that will is now admitted to be 26th September, 1893, and not 20th December, 1894.

In the Privy Council judgment the following passages occur :—

"By para. 1 the testator, after reciting that he had then no male issue but had two wives living, directed that if any child should be born of either wife, or if children should be born of both wives, they should after his death become possessors of all his movable and immovable properties, whether ancestral or self-acquired, whereby the name and reputation of his ancestors might be perpetuated and the religious merit of his family might be preserved. By para. 2 he directed that if at the time of his death his children should be minors his wives successively should act as their guardians and manage the estate.

* * * * * *

The third and fourth paragraphs of the will are in the following terms :—

'3. If there be no son born of either of my wives and only (a) daughter be born, in such a case also the management of the reasat shall be conducted by either the senior or the junior wife whoever may be existing and her (the daughter's) guardianship and training and education shall be conducted as provided in paragraph 2. She will have the daughter married in a good family as is the custom in my family. My wives up to the terms of their respective lives shall remain proprietresses and possessors as provided in paragraph 2. After the death of both of them, my daughter shall become the proprietress, and she shall perpetuate the name and reputation of my family by residing in my house and maintaining the same as the absolute proprietress.

4. If by the will of Providence no male or female child be born to me, in that case, both my wives, one after another as provided in paragraph 2, shall remain, in concord, proprietors and managers and perpetuate the name and reputation of the family up to the terms of their lives. I also authorise my wives that, if both of them exist, they in concurrence, or if either of them die, the surviving wife alone, shall select according to her choice some worthy boy from my family or the families of my relatives and adopt him, who shall remain obedient and dutiful as a son up to the terms of the lives of my wives; and the said adopted son after the death of my two wives shall remain absolute proprietor in my place as my son, and he shall have all authority such as is possessed by me'."

Rupkali died on 8th February, 1899; thereafter Bhagwat Koer was in sole possession of the property left by her husband. From 7th March, 1900, to 14th September, 1925, she purported to make certain alienations. These have all been held to be void in the present litigation, and no dispute was raised before their Lordships with reference to this question.

1. (1919) 37 M.L.J. 513 : L.R. 46 I.A. 259 (265) : I.L.R. 47 Cal. 466 (P.C.).

On 13th February, 1936, Bhagwat Koer purported to adopt Raghava Surendra Sahi, who was the first defendant in this case. In 1907, Dhanukdhari, the father of defendants 8 and 9 filed three suits challenging the adoption made by Bhagwat Koer and laying claim to the property left by Mahabir and to certain other property as the property of Jugal Kishore. The three suits gave rise to the Privy Council appeal above referred to. By a judgment delivered therein on 30th June, 1919, it was held, *inter alia* :

(1) That the adoption was invalid.

(2) That on the true construction of Mahabir's will and in the events which happened, the estate was given to the testator's widows successively for life and, after the death of the survivor, to Ramdulari, so that Ramdulari became entitled at birth to a reversionary estate under section 106 of the Indian Succession Act, corresponding to section 119 of the later Succession Act of 1925 which governs the case.

(3) That Dhanukdhari was not entitled to any of the property he claimed : because, as regards the property left by Mahabir, he had not adduced evidence proving his claim to be entitled to Ramdulari's estate : and as regards the property left by Jugal Kishore, because Anandi Koer had relinquished her estate in favour of Mahabir. In September, 1923, Dhanukhdari died, and on 18th September, 1925, Bhagwat Koer died. The question then arose who was the reversionary heir to the estate to which Ramdulari had become entitled under the terms of Mahabir's will.

With reference to this question two suits were filed in the Court of the Subordinate Judge at Gaya. Suit No. 26 of 1930, afterwards suit No. 38 of 1932, was filed on 27th May, 1930, by Sia Prasad and others against Raghava Surendra Sahi, the adopted son, Sarabjit and others, claiming the property left by Mahabir and challenging the alienations made by Bhagwat Koer. A few months later, on 5th July, 1930, Sarabjit and another filed suit No. 30 of 1930 in the same Court, against Sia Prasad and others, claiming, *inter alia*, to be similarly entitled. These are the two suits giving rise to the present consolidated appeals. Three other suits were filed in the same Court by the alienees of Bhagwat Koer claiming the properties the subject of such alienations.

Both Sia Prasad and Sarabjit died during the hearing of the above suits and their personal representatives were brought on the respective records.

On 5th June, 1934, the Subordinate Judge, after taking evidence, oral and documentary, by a judgment of that date decided all the five suits. In the course of his judgment he held that the alienations made by Bhagwat Koer of her husband's property were invalid and that on Ram Dulari's death Rupkali inherited the vested remainder of which Ramdulari was the owner, and after Rupkali's death the same passed to Bhagwat Koer as Ramdulari's heir. He further held that, according to the rules of Hindu Law, on Bhagwat Koer's death the property would revert to the heir of Mahabir as father of Ramdulari, that Sia Prasad was a gotraja sapinda (agnate) of Mahabir, and Sarabjit was a bhinnagotra sapinda (cognate) ; that Sia Prasad came within seven degrees of agnatic relationship, and Sarabjit within five degrees of cognatic relationship, but, as an agnate would exclude a cognate, Sia Prasad would be the preferential heir.

Appeals to the High Court at Patna were filed in each of the five suits, and were heard together by Wort and Agarwala, JJ., who by concurring judgments dated 9th May, 1939, dismissed all the five suits and passed decrees accordingly.

After discussing subsidiary questions which are not material in this appeal, Wort, J., held as regards the claim of the present appellants that the arguments on which it was based had always been rejected, that the authorities were entirely against them, that the arguments were supported neither by authority nor by authoritative textbooks, which were unanimous in holding that sapindaship in cases like the present, and in the case of succession to males, depended entirely upon the

same principles. Agarwala, J., held in his concurrent judgment, that after considering the various texts and decided cases and the comments of Sanskrit scholars and jurists, as also judicial dicta, he had no hesitation in rejecting the contention that Sarabjit was to be preferred to Sia Prasad as an heir to Mahabir. He added that even if the texts and commentaries were capable of being construed in the sense of this contention, he would hesitate to adopt that construction as it would undoubtedly have the effect of upsetting titles long founded on the contrary view.

The appeals were accordingly dismissed and decrees drawn up.

Two sets of appellants who represented the interests of Sarabjit, being dissatisfied with the two decrees of the High Court giving preference to Sia Prasad, severally appealed to His Majesty in Council and the two appeals were consolidated by order of the High Court.

The question in this case is whether the claim of a remote agnate is to be preferred to that of a less remote cognate. The parties are agreed and it is clear that in the case of a maiden the heirs to her stridhan are, first, her uterine brothers, secondly, her mother, and, thirdly, her father. It was contended for Sia Prasad that, after this order, the heir to the deceased maiden's stridhan, is the same as the heir to her father's property. The contrary view suggested on behalf of Sarabjit was that the next heir to her stridhan is not the father's heir but his nearest relation by blood. In support of this contention, reliance was placed upon the following texts repeated in the argument before their Lordships, *viz.*:

(1) Manu, Ch. 9, Verse 187.

(2) A text of Baudhayana quoted in the Mitakshara, Ch. II, Section XI, Placitum 32.

(3) Viramitrodaya's comments on the Mitakshara referring to Baudhayana's text.

(4) Mitakshara, Ch. II, Section XI (Colebrooke's Translation, p. 368).

(5) Yagnavalkya's text, Ch. 2, Verses 135, 136, quoted in Mitakshara, Ch. II, section I, Placitum 2 (Colebrooke's Translation, p. 324).

As these authorities have been considered in the course of this judgment, it is unnecessary to make separate comments on them.

It cannot be disputed that, taking the term *sapinda* in a wider sense, both claimants, Sarabjit and Sia Prasad, are within the degrees of relationship from a common ancestor within which sapindaship is recognised, *viz.*, up to the fifth degree, on the mother's side in the mother's line, and up to the seventh degree on the father's side in the father's line, after which sapindaship, according to well-accepted cannons, ceases (see *Ramachandra Martand Waikar* v. *Vinayak Venkatesh Kothekar.*[1]) It is therefore urged for the appellants that, both claimants being sapindas within heritable degrees, no distinction could be made between them with reference to the succession to stridhan, and the nearer among them should be preferred to the remoter one. But, admitting the force of this argument, the distinction has to be borne in mind (which the Mitakshara and Viramitrodaya both accept, as is shown in the course of this judgment) between a bhinnagotra sapinda (connected through a female relation and otherwise called a *bandhu* in the Mitakshara) and a sagotra sapinda (connected through male relations and therefore bearing the same gotra as the last owner.)

As pointed out in the judgments of the Courts below, no special rules relate to the succession to a maiden's property beyond the heirs specially enumerated in the several texts and such succession is governed by the rules which relate to the succession of a woman married in an unapproved form *Dwarkanath Roy* v. *Sarat Chandra Singh Roy*[2]—the reason apparently being that in both cases the woman is free from the *patria potestas* of the husband, in one case because she is unmarried,

1. (1914) 27 M.L.J. 333 : L.R. 41 I.A. 290, 307 : I.L.R. 42 Cal. 384 (P.C.).

2. (1911) I.L.R. 39 Cal. 319 (326,338).

and, in the other, owing to the inferior form of marriage, in which the husband's dominion over her is not as complete as in the case of marriages in the so-called approved forms.

As the parties belong to the Mitakshara School, it will be necessary to consider what the position of the Mitakshara is with reference to this question, and then to find out whether and how far the views of the Mitakshara have been varied or modified by later commentators, like the Viramitrodaya, which are regarded as authorities in the Benares School.

The text on which the Mitakshara bases its commentary is that of Yagnavalkya, Ch. II, Verse 145: the Sanskrit text is to be found in Mandlik's Hindu Law, Yajnavalkya's Smriti section, p. 139. Its translation, which is at p. 224, is as follows:—

"The property of a childless woman married in the Brahma or any other (of the four approved forms of) marriage goes to the husband; in the remaining (four forms of marriage) it goes to the parents; but if she leave issue it goes to her daughters."

The further line of heirs is not mentioned in this text of Yajnavalkya but is elaborated in the commentary of the Mitakshara on this text in Ch. II, Section XI, Placitum 8 and following (Colebrook's Translation, pages 367 and following), which is as follows: (portions not material in the present case have been omitted in this quotation.)

"(8) A woman's property has been thus described. The author next propounds the distribution of it: 'Her kinsmen take it, if she die without issue.'

"(9) If a woman die 'without issue'; that is, leaving no progeny; (the progeny is here described) the woman's property, as above described, shall be taken by her kinsmen, namely, her husband and the rest, as will be (forthwith) explained.

"(10) The kinsmen have been declared generally to be competent to succeed to a woman's property. The author now distinguishes different heirs according to the diversity of the marriage ceremonies. The property of a childless woman married in the forms (designated as approved) goes to her husband: but, if she leave progeny, it will go to her (daughter's) daughters; and, in other forms of marriage (designated as unapproved) it goes to her father (and mother) on failure of her own issue."

"(11) Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage (designated as approved) the (whole property, as before described, belongs in the first place to her husband. On failure of him, it goes to his nearest (tat pratyasanna) kinsmen (sapindas). (Colebrooke's addition 'allied by funeral oblations' has no basis in the original). But, in the other forms of marriage (unapproved) the property of a childless woman goes to her parents, that is, to her father and mother. The succession devolves first (the reason has been before explained) on the mother and then on the father. On failure of them, their next of kin (tat pratyasanna) take the succession."

Then follows the Viramitrodaya, which is undoubtedly regarded as one of the most important commentaries on the Mitakshara (see *Ramachandra Martand Waikar* v. *Vinayak Venkatesh Kothekar*[1]) and as a treatise of high authority at Benares and receivable as an exposition of what might have been left doubtful by the Mitakshara and declaratory of the law of the Benares School. (See *Girdhari Lall Roy* v. *The Bengal Government*[2]). It will therefore be useful to find out what light it throws on the views of the Mitakshara on this question. The Viramitrodaya observes (Ch. V, Part 2, Placitum 9, G. Sarkar's edition, Sanskrit text, p. 97, translation, pp. 240, 241):

"The property of a childless woman married in the Brahma or the like form of marriage (approved form) belongs to her husband, and, on failure of him, to the husband's nearest relations. *For, the nearest to the owner being debarred by the husband, preference ought to be given to the nearest to the husband.*

"But if a woman be married 'in other forms of marriage' *i.e.*, in the Asura or the like, it goes to her father . . . . amongst them also it goes to the mother in the first instance, and after her the father, according to the principle set forth while explaining the term 'parents' (pitarau) in the text of Yajnavalkya 'the wife and the daughter also, the parents, etc.' *There being no other text against the application of that principle to the present case.*

"Besides it is expressly declared that the father inherits the property of a maiden on failure of the mother, so the same order is proper in this case also. Thus Baudhayana declares—The wealth of a

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1. (1914) 27 M.L.J. 333: L.R. 41 I.A. 290: I.L.R. 42 Cal. 384 (P.C.).
2. (1868) 12 M.I.A. 448.

deceased maiden let the uterine brothers themselves take; on failure of them it shall belong to the mother, in her default, to the father.' On failure of the mother and the father it goes it to their nearest relations (tat pratyasanna)."

(For a discussion of this text in relation to the doctrines of the Mitakshara, see *Tukaram* v. *Narayan Ramchandra*[1].)

It is clear from these passages that, so far from advocating a different view, the Viramitrodaya and also Baudhayana are in complete accord with the Mitakshara view that:

(1) It is the husband's heirs or the father's heirs as the case may be (and not the maiden's) who succeed.

(2) Such heirs will be those who are "their nearest relations" (tat pratyasanna) the same expression as the Mitakshara has employed in the same context.

It is significant that in the course of the discussion in which it prefers the mother to the father, the Viramitrodaya relies upon the same text of Yajnavalkya, which lays down the order of succession to the separate property of a male. That text is in Ch. II, Verses 135, 136. The Sanskrit text is to be found in Mandlik's Hindu Law, Section Yajnavalkya Smriti, p. 138, and its translation is at p. 220, and is as follows:—

"The wife and the daughters, also both parents, brothers likewise, and their sons, jentiles (gotrajas) cognates (bandhus), a pupil and a fellow-student: on failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue. *This rule extends to all (persons and) classes.*"

It was contended before their Lordships that the Viramitrodaya, commenting on and explaining the above text of Yajnavalkya, intended to place agnates and cognates on the same footing in relation to the property of a woman, but there is no indication of such an intention on its part. On the contrary, dealing with the rights of persons whose interests are vested, the Viramitrodaya proceeds to observe (*see* Ch. III, Part I, section 4, G. Sarkar's edition, translation, p. 140).

"In fact, when a person in whom right is vested dies, it is proper that his property should be inherited by his near relations . . . . When the owner of any property is dead, then if he leave no male issue, his property is inherited by his relations such as his wife, etc.; *this is what the text (of Yajnavalkya) means.*"

It is clear that by quoting the words "his wife, etc." the author, in support of his view, is referring to the text of Yajnavalkya quoted above (Ch. II, Verses 135, 136): "The wife and the daughters, also both parents, brothers uterine, and their sons, gotrajas, bandhus, etc."

Further light is thrown on this question by the comments of Kamalakara, the eminent author of Nirnaya Sindhu and Vivada Tandava. In the latter compilation he observes (*see* the Sanskrit text and translation appended to Ghose's Principles of Hindu Law, 1917 edition; the text is at p. 1155, line 23, and the translation at p. 1142 is as follows):

"In default of the husband, the estate is obtained by his near relations (*tat pratyasanna*; the same expression as the Mitakshara and Viramitrodaya have used), beginning with 'the lawfully wedded wife and the daughter, etc.' *as described in the text of Yajnavalkya in the rule about succession to sonless men.*"

In the above translations important words have been italicised.

Their Lordships agree with the opinion of Agarwala, J., that it has been generally understood that Kamalakara's view relating to the succession to stridhan, in default of husband in the case of a woman married in the approved form, and in default of father in other cases, was that the heirs of the husband or father succeeded in the order laid down in Yajnavalkya's text relating to the succession to the property of a male. This text is decisive of the question at issue in this case, and the trial Court, as also the High Court, Judges were entitled to rely on this text of Kamalakara as a great authority in the Benares School. Such authority cannot be doubted.

Sir Gooroo Das Banerjee in his Tagore Law Lectures, second edition, p. 363, observes:

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1. (1911) I.L.R. 36 Bom. 339 (F.B.).

"Kamalakara's opinion is entitled to be followed as authority in the Benares School, when it is not in conflict with that of any other authority, and in the present instance the rule based on his opinion has the further recommendation of being simple, as it makes the order of succession to stridhan correspond after a certain point, to that applicable to a man's property."

Similarly, West and Buhler (Volume I, p. 213), referring to the above opinion of Kamalakara, observe),—

"This opinion seems to be based on the consideration that as the sapindas inherit only through the husband, they virtually succeed to property coming from him, and that consequently they must inherit in the order prescribed for the succession to a male's estate."

Kamalakara is also referred to as an authority in *Dwarka Nath Roy* v. *Sarat Chandra Singh Roy*[1] where Chatterjea, J., after quoting the text of Kamalakara mentioned above, observes :

"So that, according to Kamalakara the nearness of kinsmen in the rule laid down in the Mitakshara is to be determined according to the well-known text of Yajnavalkya relating to the succession of a male owner dying without male descendants."

In the face of these textual authorities and the concurrence of the Mitakshara the Viramitrodaya and Kamalakara, there is not much scope for the argument that the stridhan heirs of a maiden are different from the heirs of her father, or that these heirs are not the same as those enumerated in the ancient text of Yajnavalkya (Ch. II, Verses 135, 136) *viz.*, "the wife, the daughters, also both parents, brothers likewise and their sons, gotrajas, bandhus, a pupil and a fellow student" who succeed to his property. If so, it is clear that bandhus (bhinnagotra) would be excluded by gotrajas. It is to be noted that, as the High Court Judgments point out, the said text of Yajnavalkya has been accepted by text writers as providing the general rule prescribing the order of succession in all cases of separate property. One has therefore to look for a clear authority that the rule contained in that text was not intended to apply to cases of stridhan property. As both the learned Judges of the High Court and also the Subordinate Judge observe, no such text or judicial decision abrogating the value of the text of Yajnavalkya in stridhan cases has been adduced and as Wort, J., after a careful consideration of the text and judicial decisions, observes : "The authorities are entirely against the view which has always been rejected. The argument is supported neither by authority, nor by the authoritative authors of text books, who are unanimous that sapindaship in a case such as we have before us, and in the case of succession to males, depends entirely upon the same rules." Their Lordships see no reason to differ from this view and none of the textual authorities cited before them goes to prove that the unanimous view taken in this case by the three Judges in India is erroneous.

But the question does not rest here. It is carried further by the decisions of this Board, as also of the High Courts in India, which set this matter beyond all doubt. These have been exhaustively reviewed in the two separate and able judgments of the High Court, and as their Lordships agree in the main with their deductions and the conclusion at which they have arrived, their Lordships find themselves relieved of the necessity of discussing the law in any detail. Their Lordships will, therefore, deal briefly with some of these rulings to which their attention was invited by the appellants' Counsel. Their effect is to establish that it is now a well accepted rule that the text of Yajnavalkya mentioned above also governs succession to the stridhan property in the same order of succession as is mentioned in the text.

In *Dwarka Nath Roy* v. *Sarat Chandra Singh Roy*[1], a sister as father's daughter, and a sister's son as father's daughter's son, were preferred to a father's brother's son.

This was followed in the case of *Nanja Pillai* v. *Sivabagyathachi*[2], where the daughter of a co-wife, that is the daughter of the father by another wife, excluded the father's brother's son. In this case the text of Kamalakara was accepted and relied upon (page 118) and in the course of the judgment the different rulings of Bombay, Allahabad, and Calcutta, bearing on this point were briefly reviewed.

1. (1911) I.L.R. 39 Cal. 319. 2. (1911) 21 M.L.J. 850: I.L.R. 36 Mad. 116.

The very next year, this ruling was followed by another, reported in *Kanakammal* v. *Ananthamathi Ammal*[1], where the same principle was laid down.

In the same year arose the case reported in *Kamala* v. *Bhagirathi*[2], where a step-mother (father's widow) was preferred to the woman's mother's sister. It was further laid down that the mother's heirs would be the same as the father's heirs as, according to Hindu notions, the mother becomes by marriage a member of the husband's family. The case followed two rulings in Bombay. *Tukaram* v. *Narayan Ramchandra*[3] and *Janglubai* v. *Jetha Appaji*[4].

Seven years later the same principle was laid down in *Sundaram Pillai* v. *Ramasamia Pillai*[5], where the father's paternal uncle's son was preferred to the father's sister. In this case the text of Brihaspati, Baudhayana and the Smriti Chandrika were discussed.

Then came the case of *Bai Kesserbai* v. *Hunsraj Morarji*[6], a decision of this Board where a co-widow, as the wife of the husband, succeeded over the husband's brother or brother's son.

The learned counsel for the appellant, who conducted the appeal with great fairness, admitted that to reverse the decision of the High Court in this appeal would involve the reversal of all these rulings which have been accepted as laying down the law for a long period. The remarks of Agarwala, J., are therefore pertinent that, even if the text and commentaries were capable of being construed in the sense in which the appellant contends, the learned Judge would hesitate to adopt that construction, for it would inevitably have the effect of upsetting titles long founded on the contrary view.

Reference was made by the appellant's counsel to the case of *Budha Singh* v. *Laltu Singh*[7], in support of his contention that judged by the test of funeral oblations, Sarabjit would be the preferential heir over Sia Prasad. But as the learned Subordinate Judge has pointed out, that ruling applies only to the case of sagotra sapindas and provides a test of preference when the rival claimants belong to the same class of sapindas and not when one of such claimants is a bhinnagotra sapinda and the other a sagotra sapinda.

A further argument was advanced by Mr. Sen Gupta for the appellants, raising points which were highly controversial and not presented for the consideration of any of the Courts below. For instance, he argued for the contrary rule, relying upon the statement of Nanda Pandita occurring in a comment in Stokes' Hindu Law Books, p. 446. Apart from the difficulty caused by this point being novel and raised for the first time before their Lordships, the authority of Nanda Pandita, the author of Dattaka Mimamsa, cannot be accepted as against the rules mentioned in Mitakshara and other commentaries (*see* Mayne's Hindu Law and Usage, 9th paras. 30 and 31).

For these reasons their Lordships are of opinion that the judgments appealed from are right and ought to be affirmed and these appeals ought to be dismissed. There will be one set of costs payable by the appellants to the first set of respondents claiming through Sia Prasad; respondents Maharaja Kumar Gopal Saran Narain Singh (respondent No. 21 in the first appeal and respondent No. 4 in the second) and Kumar Sayeeda Khatoon (respondent No. 22 in the first appeal and respondent No. 5 in the second) for herself as one of the three legal representatives of Syed Mohammad Wali (respondent No. 14 in the first appeal and respondent No. 20 in the second) will bear their own costs. Their Lordships will humbly advise His Majesty accordingly.

V.S. *Appeals dismissed.*

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1. (1912) I.L.R. 37 Mad. 293.
2. (1912) 23 M.L.J. 518 : I.L.R. 38 Mad. 45.
3. (1911) I.L.R. 36 Bom. 339 (F.B.).
4. (1908) I.L.R. 32 Bom. 409.
5. (1919) 37 M.L.J. 209 : I.L.R. 43 Mad. 32.
6. (1906) 16 M.L.J. 446 : L.R. 33 I.A. 176 : I.L.R. 30 Bom. 431 (P.C.).
7. (1915) 29 M.L.J. 434 : L.R. 42 I.A. 208 : I.L.R. 37 All. 604 (P.C.).

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Allahabad.)

PRESENT :—LORD SIMONDS, MR. M. R. JAYAKAR AND SIR JOHN BEAUMONT.

Mst. Dan Kuer .. *Appellant**

v.

Mst. Sarla Devi .. *Respondent.*

Hindu Law—Joint family—Maintenance—Nature and extent of the obligation of the joint family in regard to—Transfer of Property Act (IV of 1882), section 39 (prior to amendment in 1929)—Applicability—Charge for maintenance of wife created by a partition award—Transfer of properties charged to one with knowledge of the award—Transfer, if subject to charge for maintenance—Wife, not being a party to the contract in the award, if can sue to enforce it—Contract—Third party—Right to sue.

Two obligations confront a joint family : (1) The obligation to pay the debts (for instance, of the father) binding on the family ; and (2) the moral obligation to provide maintenance to the widows of the family. The latter obligation would, under certain circumstances, ripen into a legal obligation, as, for instance, when a charge is created on specific property of the family either by agreement or a decree of the Court ; so long as neither of these two obligations has taken the form of a charge on the family property, the obligation to pay the binding debts will have precedence (as for instance, in the course of the administration of the estate) over mere claims of a female member's maintenance ; but, if either of these two obligations assumes the shape of a charge, it would take precedence over the other. This rule of Hindu Law is thus in accord with the principle underlying section 39 of the Transfer of Property Act.

Somasundaram Chetty v. *Unnamalai Ammal*, (1920) 39 M.L.J. 179 : I.L.R. 43 Mad. 800, referred to.

A partition award recited that "we allot the property mentioned in list A specified below, to *K*, which shall remain in his possession subject to a charge for the maintenance of *S* (his wife) and if she ever falls out with *K* and they cease to live together the charge for maintenance thereon will be at the rate of Rs. 75 a month, the amount fixed by us." The properties mentioned were transferred by *K* on the following day by way of usufructuary mortgage to one *D* (who was related to the family and was a well-wisher and who knew about the award) in which the properties were expressed to be free from all liabilities and the arbitration award was expressly mentioned. Subsequently the properties were sold to *D*. In a suit by *S* after the death of *K* to enforce her right to maintenance on the properties charged, it was contended that the charge was not binding on the transferee and that *S* being a stranger to the award could not sue to enforce it.

Held, that the award created a valid charge in favour of *S* on the properties allotted to *K* and that as *D* was conversant with the whole arrangement leading to the partition award and the charge on the properties and as the mortgage and sale related to all the properties which were available for the payment of maintenance, the transfer was subject to the widow's right to maintenance. The formal and general clause contained in the mortgage deed to *D* as to the properties being free from all liabilities cannot override the conclusion suggested by the other terms of the mortgage and the facts and evidence in the case.

The rule which has prevailed in India that where a contact is intended to secure a benefit to a third party as a beneficiary under a family arrangement he may sue in his own right to enforce it has been extended to cases, where provision is made for the maintenance of the female members of a Hindu family on a partition of the joint family property between the male members.

J. D. Casswell, K.C. and *H. J. Umrigar* for Appellant.

C. S. Rewcastle, K.C. and *R. Parikh* for Respondent.

Their Lordships' Judgment was delivered by

MR. JAYAKAR.—This is an appeal from a judgment and decree of the High Court of Judicature at Allahabad dated March 12, 1942, which reversed a judgment and decree of the Court of the Additional Subordinate Judge of Etah, dated July 31, 1935.

The main questions to be determined in this appeal are :—

(1) Whether a registered partition award dated January 8, 1921, created a valid charge in favour of the respondent, Sarla Devi, on the property (the two villages of Quazipur and Mai) allotted to her husband Nidhan Singh ; and

(2) Whether Drigpal Singh, the predecessor-in-title of the appellant, Dan Koer, had notice (actual or constructive) of the said award and charge, when he took a usufructuary mortgage of the said two villages on the following day, January 9, 1921, wherein a reference was made to the said award.

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* P. C. Appeal No. 40 of 1945. 24th July, 1946.

The pedigree of the family, so far as it is material to the case, is as follows :

Raja Lachman Singh.

- Kanhaiya
  - Daughter.
  - Daughter = brother of Rajendra Bahadur Singh.
  - Nidhan Singh = Mst. Sarla Devi Respondent.
    - Ramsab Indar Partab.
    - Raghu Indar Partab.
  - Lakhan Singh.
    - Daughter = Rajendra Bahadur Singh.
  - Jaswant Singh.
  - Lokendra Singh.
- (1) Mst. Kanabai = Drigpal Singh Kunwar = (2) Mst. Champa = (3) Mst. Dan Kuer (Appellant).

The family was subject to the Mitakshara Law of the Benares School. It had considerable property. After the death in 1911 of Kanhaiya, Nidhan Singh and his three brothers effected about 1912 a partition of their joint family property and separated. After the partition, Nidhan Singh, without any lawful family necessity, improperly contracted debts. He became a spendthrift. His wife, the respondent, who is a *purdanashin* lady, objected, on behalf of herself and her two minor sons, to this extravagant behaviour of her husband. She therefore consulted Drigpal Singh (who was related to the family and was a well-wisher), and also her brothers-in-law, about securing a partition between her husband and two sons. The object was to save some of the joint family property from liability to satisfy the debts of Nidhan Singh and to safeguard the interests of her sons and of herself. Drigpal Singh, she affirms, advised a partition and told her he would get her a maintenance allowance of Rs. 75 per month set apart for her in the partition deed. Five arbitrators, including the three brothers of Nidhan Singh, made a partition award dated January 8, 1921. By it, Nidhan Singh was allotted the two villages mentioned above and the shares of the two minor sons were separated from the share of Nidhan Singh. The relevant part of the award, the construction and the legal effect of which are involved in this appeal, is in the following terms :—

" We allot the property mentioned in List A specified below, to Kunwar Nidhan Singh, which shall remain in his possession subject to a charge for the maintenance of Mst. Sarla Devi (the respondent) and if she ever falls out with Kunwar Nidhan Singh and they cease to live together, the charge for maintenance thereon will be at the rate of Rs. 75 a month, the amount fixed by us."

On the following day, January 9, 1921, Nidhan Singh borrowed Rs. 40,000 from Drigpal Singh, on the security of the said two villages, and executed a usufructuary mortgage deed, in which the property was expressed to be free from all liabilities, and the arbitration award was expressly mentioned. On August 5, 1921, Nidhan Singh sold the mortgaged villages to Drigpal Singh for Rs. 30,000. In or about 1923, the Court appointed respondent the guardian of her minor sons. About 1925, Drigpal Singh died, leaving him his third wife, the appellant. About 1928, Nidhan Singh died, leaving him surviving a widow, the respondent, and two sons.

On January 9, 1933, the respondent filed the present suit in the Court of the Additional Subordinate Judge of Etah against the appellant. In her plaint, after setting out the facts stated above, she alleged that the property was given to Nidhan Singh charged with her maintenance, and that after the award, Nidhan Singh had mortgaged the property to Drigpal Singh and then sold it to him. Drigpal Singh took the property subject to the maintenance charge, and on his death, the appellant succeeded to the property subject to the same charge, but, in spite of repeated demands, the appellant had refused to pay the maintenance, with the result that a suit had to be brought for the recovery of Rs. 10,800, the amount of

maintenance for twelve years from January 8, 1921 (the date of the award), to the date of the suit. She prayed that a decree might be passed in her favour.

On March 20, 1933, the appellant filed a written statement stating, among other things, that no charge had been created as alleged in the plaint, that at the time of the mortgage and sale, Drigpal Singh had no notice of the partition or arbitration award; that he had taken the property on the understanding that it was free from all liabilities; that the charge for the maintenance allowance was mentioned in the award deed as the result of a conspiracy and fraud committed against Drigpal Singh, in which the respondent, the members of the family and their servants had joined, and that the respondent was not entitled to any maintenance either during the period when her husband was alive or thereafter.

The learned Additional Subordinate Judge raised certain issues, including the two questions mentioned above and, after recording oral and documentary evidence, he held on the first of the said two questions that the award was valid in other respects but the portion thereof relating to the maintenance of the respondent was invalid and unenforceable; the respondent was not a party to the reference to arbitration, and the arbitrators had no power to adjudicate on her right of maintenance and make it a charge on the property; a trick had been played on Drigpal Singh by making the said provision in the award out of the property mortgaged to him. He further held that the charge was a conditional one; that such a charge could be conditionally created, the condition being that she should fall out with her husband and they should cease to live together. On the second of the said questions, he held that Drigpal Singh was not aware of the maintenance charge on the mortgaged property, that it had not been brought to his notice; it was entered surreptitiously in the award behind his back with some ulterior motive, there was an active concealment of the charge from him and he, having purchased the property for a good consideration without notice of the charge, took the property free from it. On these grounds, he dismissed the suit with costs. A decree dated July 31, 1935, was accordingly drawn up.

From this decree the respondent appealed to the High Court of Judicature at Allahabad. On March 12, 1942, the High Court (Allsop and Verma, JJ.) delivered judgment. They held that upon a proper construction of the award, a charge had been created by it from the time of partition, that the charge was not conditional and there was no question of any condition having to be satisfied. They further held that the award definitely mentioned the charge and was also mentioned in the mortgage deed, and Drigpal Singh had been conversant with the whole arrangement, that he had not been deceived about the conditions of the partition, and that the appellant, as the representative in interest of Drigpal Singh, could not avoid the consequences of the charge on the allegation that Drigpal Singh was a transferee without notice of the charge, and that he was in no better position when he later bought the property. They, therefore, allowed the appeal and decreed the suit with costs in both Courts. A decree dated May 12, 1942, was accordingly drawn up.

From this decree the appellant has appealed to His Majesty in Council.

On the two main questions set out above, their Lordships feel no difficulty in agreeing with the conclusions which the High Court has arrived at. On the first of the said two questions, *viz.*, whether the award created a valid charge in favour of the respondent on the property (the two villages of Quazipur and Mai) allotted to Nidhan Singh, the terms of the award clearly charged the property allotted to Nidhan Singh. Nothing could be clearer than the words in the award:

"We allot the property mentioned in List A specified below to Kunwar Nidhan Singh, which shall remain in his possession subject to a charge for maintenance of Mst. Sarla Devi."

On the second question, whether Drigpal Singh, the predecessor-in-title of the appellant, had notice of the said award and charge when he took the mortgage on the following day, the circumstances which led to the award are mentioned in it. From them and the other evidence in the case, it clearly appears, as the

High Court judgment points out, that after the partition, Nidhan Singh led a life of great extravagance and got involved in debt. The result was that the respondent sought the assistance of his brothers and other well-wishers of the family (including Drigpal Singh) and obtained the partition between him and her two sons, who were minors at the time. The arbitration award was drawn up, signed and registered on January 8, 1921. The arbitrators who made the award were no strangers but were the three brothers of Nidhan Singh and two other gentlemen apparently well-known to the family, the last of whom was a Deputy Collector. The arbitrators say in the award that they had been approached by the respondent to effect the partition because of her husband's extravagance and that they thought it proper to accede to her request in spite of her husband's objection, because the latter had admitted that he could not act cautiously in spending money and because they knew from personal knowledge and enquiries that he had been extremely extravagant. The result was that they allotted the property to Nidhan Singh and other property to the minor sons and they charged the property allotted to the husband with the maintenance of the respondent. On the next day, January 9, Nidhan Singh executed a deed of usufructuary mortgage of the whole property allotted to him in favour of Drigpal Singh and the deed was registered on January 10, and on August 3, 1921, he sold the equity of redemption to Drigpal Singh. This is the substance of the story evidenced by the award and other evidence.

It is clear to their Lordships from these circumstances, and also the evidence of Todar Singh, the general attorney of Drigpal Singh, and the main evidence produced on behalf of the appellant, that Drigpal Singh figured in the transaction from the beginning, being regarded as one of the well-wishers of the family, and that he knew full well what was happening. Todar Singh had to admit, in spite of his strong leaning in the appellant's favour, that the respondent requested Drigpal Singh to agree to advance a loan to Nidhan Singh as the latter was heavily indebted. Drigpal Singh's wife supported her request. Nidhan Singh's wife then pressed him, adding that her children were going to be ruined. Thereupon, Drigpal Singh said he would look into the papers and then give a definite reply. Drigpal Singh came out and had a talk with Nidhan Singh and others on the proposal of advancing a loan. Nidhan Singh and others requested him to take a usufructuary mortgage of the property, and Drigpal Singh agreed. Gopi Chand, the general attorney of Nidhan Singh, showed papers to Drigpal Singh then and there. Nidhan Singh and all those who were present there had informed Drigpal Singh that a partition between Nidhan Singh and his sons had already taken place and that the villages sought to be mortgaged were allotted to the share of Nidhan Singh. This is a clear statement of what happened, drawn out of the mouth of a partisan witness in favour of the appellant. This is apart from the circumstance that the effect of the partition and the charge are expressly mentioned in clear terms in the award and in the deed of mortgage which Drigpal Singh took on the very next day after the award. Similarly, the sale deed, which followed a few days later, also states that the property which was the subject-matter of the sale was allotted to the share of the mortgagor under the arbitration award dated and registered on January 8, 1921. It is further to be noted that the mortgage amount of Rs. 40,000 was not paid into the hands of Nidhan Singh but was, under covenant No. 1 of the mortgage deed, to remain with the mortgagee for payment to the creditors and for meeting other necessities, which fact clearly supports the conclusion that Drigpal Singh was on terms of trust and confidence with the family, including the respondent, who was a *purdanashin* lady. It is true that in covenant No. 3 of the mortgage deed, the property was conveyed free from all liabilities. That clause appears to be a distant imitation of the covenants usually found in an English mortgage, but it is clear that the formal and general nature of this clause cannot override the conclusion suggested by the other terms of the mortgage and the facts in evidence in this case. Their Lordships have, therefore, no difficulty in coming to the conclusion, as the High Court had done, that Drigpal Singh was conversant with the whole arrangement leading to the partition, award and the charge on the property. In this view of the case, it would seem unnecessary to go into the question argued before their Lordships about

constructive notice or the effect of registration arising under the provisions of section 3 of the Transfer of Property Act.

An argument was addressed to their Lordships based upon the fact that section 39 of the Transfer of Property Act which was in operation in 1921, the year of the award, mortgage and sale was different in terms from the present section introduced by the Amending Act of 1929. Under the unamended section, it is argued the transferee must be proved to have had notice of the intention of defeating the right to receive maintenance and mere notice of the right to receive maintenance would not be enough. But in this connection two circumstances have to be noted: (1) that the amended section under which notice of the right to receive maintenance would be enough was in operation at the date of the suit, January 9, 1933; and (2) assuming that the present case is governed by the unamended section, it has been held by the High Courts in India, in cases arising under that section, that if the property left by the husband was limited or the transfer to the purchaser was of all the property which was available for the payment of the maintenance, and if the purchaser was proved to be aware of the circumstances of the family, the transfer would be subject to the widow's right of maintenance. (See *Bhagat Ram* v. *Sahib Devi*[1] and *Syed Abu Mahomed* v. *Saraswati*).[2] In the latter case, the intention to defeat the widow's right of maintenance, which the unamended section 39 of the Transfer of Property Act requires to be proved, was gathered from the fact that all the property available for satisfying the maintenance claim of the widow (excepting a small hut) had been transferred to the purchaser.

From a perusal of the material documents, it is clear that in the present case the two properties which were made the subject-matter of the charge by the award were the identical properties which were the subject-matter of the mortgage and the later sale deed. This will appear clearly on a comparison of the details of the property mentioned in List A to the award and the details of property annexed to the mortgage deed, and mentioned in the body of the sale deed. The mortgage and the sale, therefore, related to all the property which was available for the payment of maintenance, and if the purchaser was aware of this fact and of the circumstances of the family, it would be fair to hold that the transfer would be subject to the widow's right of maintenance.

Their Lordships' attention was invited to the case of *Lakshman Ramchandra Joshi* v. *Satyabhamabai*[3] and on the authority of that ruling, it was argued that the debts which were paid out of the mortgage amount and the proceeds of the said sale, being the debts of the family legally recoverable from the father's share, the purchaser for value would not be bound by the widow's claim for maintenance. In this connection, it is to be noted, however, that, as pointed out by Westropp, C.J. (p. 497), the decree for maintenance in the case before him was a personal decree against the person liable for the maintenance, and not against the ancestral estate, nor was any charge created on the family property. Another circumstance was that the money paid by the purchaser in that case was utilised for satisfying the claim of the widow under the maintenance decree and the costs of the suit payable to her. The case is, therefore, distinguishable from the present one. But, apart from this circumstance, the judgment of West, J., whose dissertations on Hindu Law must always command great esteem, contains an exposition of the law on this point, and the case is, therefore, rightly regarded as a leading authority on the question. In the course of his judgment (pages 506, 517) that learned Judge quotes with approval the remarks of Phear, J., in the case of *Srimati Bhagabati* v. *Kanailal Mitter*[4] that:

"as against one who has taken the property as heir, the widow has a right to have a proper sum for her maintenance ascertained, and made a charge on the property in his hands. She may also, doubtless, follow the property for this purpose into the hands of any one who takes it as a volunteer or with notice of her having set up a claim for maintenance against the heir."

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1. (1921) I.L.R. 3 Lah. 55.
2. A.I.R. 1926 Cal. 1068.
3. (1877) I.L.R. 2 Bom. 494.
4. (1872) 8 Beng.L.R. 225 : 17 W.R. 433.

and that

"when the property passes into the hands of a *bona fide* purchaser without notice it cannot be affected by anything short of an already existing proprietary right; it cannot be subject to that which is not already a specific charge or which does not contain all the elements necessary for its ripening into a specific charge" ...... "what was purchased with knowledge of a right which would thus be prejudiced is liable to her claim from the first."

To explain the necessity of the widow making her maintenance a charge on the family property, it was stated that:

"In the case of a widow of an ordinary coparcener, as against the surviving members of the joint family, her claim, being strictly limited to maintenance only, regulated by the circumstances of the joint family, it appears that, although she may have her maintenance made a charge on the property yet, if she should refrain from that course, she leaves to the coparceners an unlimited estate to deal with at their discretion."

The principle of this rule was stated in the following words:

"The knowledge of collateral rights created by agreement, in equity frequently qualifies those acquired by a purchaser. The widow's right to maintenance is a right maintainable against the holders of the ancestral estate in virtue of their holding no less through the operation of the law than if it had been created by agreement, and so when the sale prevents its being otherwise satisfied, it accompanies the property as a burden annexed to it in the hands of a vendee with notice that it subsists."

Their Lordships are in complete agreement with this view of the law.

The other case of *Soorja Koer* v. *Nath Baksh Singh*[1], to which their Lordships' attention was invited, was likewise a case where a decree for maintenance was a mere personal decree; no charge was created on the property (p. 103) and further the purchaser purchased the property at an auction sale in execution of the widow's decree for maintenance and the purchase money was utilised for providing maintenance to her.

The true rule of Hindu law in such matters would appear to be as follows:—

Two obligations confront a joint Hindu family: (1) The obligation to pay the debts (for instance, of the father) binding on the family; and (2) the moral obligation to provide maintenance to the widows of the family. The latter obligation would, under certain circumstances, ripen into a legal obligation, as, for instance, when a charge is created on specific property of the family either by agreement or a decree of the Court; that, so long as neither of these two obligations has taken the form of a charge on the family property, the obligation to pay the binding debts will have precedence (as, for instance, in the course of the administration of the estate) over mere claims of a female member's maintenance; but, if either of these two obligations assumes the shape of a charge, it would take precedence over the other. This rule of Hindu Law is thus in accord with the principle underlying section 39 of the Transfer of Property Act. (See *Somasundaram Chetty* v. *Unnamalai Ammal*[2].)

The present case is in the line of cases of which *Kuloda Prosad Chatterjee* v. *Jageshar Koer*[3] is a good illustration, the only difference being that in that case the charge was created by a compromise decree in favour of the widow. It was also a case under the unamended section 39 of the Transfer of Property Act. The properties were later transferred by mortgage by the party affected by the charge. The widow proceeded in execution of the maintenance decree for maintenance money due subsequently to the transfer. It was argued that, having regard to the provisions of section 39 of the Transfer of Property Act as it stood then, the charge created in favour of the widow under the previous compromise decree could not affect the interest of the purchasers because they were persons who took the property without notice of the right of maintenance in the widow. It was held that, apart from section 39, the decree created a charge on the property for the maintenance of the widow; the purchaser subsequently took a mortgage of the property from the party against whom the decree was passed. He is, therefore, bound in the same manner as the mortgagor was bound by it. The decision was also rested

1. (1884) I.L.R. 11 Cal. 102.
2. (1920) 39 M.L.J. 179: I.L.R. 43 Mad. 800.
3. (1899) I.L.R. 27 Cal. 194.

on another ground that the plaintiffs could hardly be said to be transferees without notice of the right of maintenance in the widow because it did not appear that before they took the mortgage they made any enquiry as to the right of the widow or whether any charge existed upon the property in question.

It was further argued that the widow, being a stranger to the contract embodied in the award, cannot sue to enforce it; but it is too late, in their Lordships' opinion, to doubt the rule which has prevailed in India that where a contract is intended to secure a benefit to a third party as a beneficiary under a family arrangement he may sue in his own right to enforce it. This seems to be the principle underlying the decision of this Board in *Khwaja Muhammad Khan* v. *Husaini Begam*[1]. In that case, their Lordships declined to apply the Common Law doctrine laid down in *Tweddle* v. *Atkinson*[2], to agreements and arrangements entered into in connection with marriages amongst communities in India like Muslims. This ruling has since been followed in India in many cases, where provision is made for the maintenance of the female members of a Hindu family on a partition of the joint family property between the male members.

Their Lordships agree with the decision of the High Court that, on a proper interpretation of the terms of the award, the charge was created from the date of the award. The reference to the exact rate of maintenance, *viz.*, Rs. 75 per month, being of no importance while the widow lived with her husband, would come into operation only after the husband and wife had ceased to live together. This part of the clause, therefore, would be operative only after that event had happened, though the charge itself would commence to operate from the date of the award. The charge was not, therefore, conditional upon the widow living apart from her husband.

Their Lordships likewise agree with the conclusion of the High Court that there is no reliable evidence to support the contention that there was a conspiracy to defraud Drigpal Singh, and that the evidence produced is of very little value. Three of the arbitrators, as is stated above, were the brothers of the husband, and another arbitrator was a person occupying the responsible position of a Deputy Collector.

As regards the period for which the maintenance allowance was due, both Courts agree in finding that the respondent lived with her husband till the time of his death in 1928 and that she received her maintenance till that period, though it is not clear, as the High Court judgment points out, whether such maintenance was not paid from the property of the minor sons. Having regard to the fact, however, that she received her maintenance up to that date and that she brought the suit long after the death of the husband, their Lordships think it would be inequitable to decree maintenance to her for the entire period beginning with the date of the award. The plaintiff did not prove her case that she lived apart from her husband. On the contrary, the evidence shows that she lived with her husband and was not without receiving her maintenance. The decision of the High Court does not decide this point. It will, therefore, be necessary to send the case back to the High Court for the purpose of determining from what date after her husband's death she is entitled to maintenance, and at what rate. In considering this question the Court may have regard to the fact that the arbitrators, who apparently knew the circumstances of the family, its needs and requirements, and also the value of its assets, fixed Rs. 75 per month as proper maintenance.

Subject to what is stated above, their Lordships are of opinion that the decision of the High Court is correct, and they will humbly advise His Majesty that this appeal be dismissed. The appellant must pay two-thirds of the respondent's costs of this appeal.

Solicitors for Appellant: *Douglas Grant and Dold.*

Solicitors for Respondent: *T. L. Wilson & Co.*

V.S. *Appeal dismissed.*

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1. (1910) 20 M.L.J. 614: L.R. 37 I.A. 152: I.L.R. 32 All. 410 (P.C.).
2. (1861) 1 B. & S. 393: 121 E.R. 762.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

R. Manicka Mudaliar .. *Petitioner.**

Madras Traffic Rules, rule 8 (a) *and* (b)—*Contravention of—What would amount to—'Vehicle' in rule* 8 (b)—*If can apply to a vehicle that is parked—Limits of the rule as to prohibition against overtaking.*

Where there was nothing in view to indicate that the driver of a motor vehicle could have apprehended causing any in convenience or danger for other traffic before he overtook a parked vehicle on the bend of a road, there is nothing wrong in such overtaking and there is no contravention of rule 8 (*b*) of the Madras Traffic Rules. Further, in rule 8 (*b*) the 'vehicle' which a person in the vicinity of a bend or corner or hill or other obstruction which impedes his view ahead is prohibited from overtaking, means a vehicle that is moving and not a vehicle that is parked.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate of Coonoor, dated 17th June, 1945, and made in S. C. S. No. 139 of 1945.

K. V. Ramaseshan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted for an offence punishable under rule 8 of the Madras Traffic Rules. He was a driver of a motor bus that was coming on the date of the offence from Ootacamund towards Coonoor. The offence is said to have taken place just below where the Ootacamund-Coonoor road branches off towards the barracks at Wellington. A military lorry was parked on the eastern side of the road just near a bend in that road. Every motor vehicle that had to pass through that portion of the road had necessarily to overtake that parked lorry. On the date of occurrence, P.W. 1, a motor cyclist was coming towards Ootacamund from Coonoor and he is said to have run into the motor bus that was coming from the north and was driven by the petitioner. The prosecution case is that there was contravention of rule 8 of the Madras Traffic Rules by the accused inasmuch as he overtook the lorry that was standing. As stated already the lorry was parked on the eastern side of the road. The evidence of the motor cyclist was to the effect that he came round the corner and found the bus in the act of passing the parked military lorry. If he was therefore able to see the bus overtaking the military lorry, then the bus must have come near much earlier than the time when the driver could have noticed the motor vehicle coming up. If that be so, there was nothing wrong in his having overtaken the military lorry. There was nothing in view to indicate that he could have apprehended causing any inconvenience or danger for other traffic, before he overtook the lorry. Therefore no offence could be said to have been committed by the petitioner by any contravening of rule 8, clause (*a*).

Now let us see if there was any contravention of rule 8 (*b*). It says that when any person is in the vicinity of a bend or corner or hill or other obstruction which impedes his view ahead he should not overtake a vehicle. In this evidently by "vehicle" was meant a vehicle that is moving and not a vehicle that is parked. If you take it as including a parked vehicle then it would mean that whenever there is a vehicle parked in a road near a bend, there should be no traffic near that portion of the road. It is clear that there was this collision between the motor cycle and the bus only after the bus had overtaken the parked lorry. This is a case therefore in which the road was blocked by a parked lorry and we will have to consider whether in the portion which was not blocked there was any contravention of the traffic rules. I am not able to see any contravention.

It is clear from the evidence of D. W. 1 that the motor cyclist was coming up the hill at a fast speed. D. W. 1 put it at 50 miles per hour, but the Magistrate himself considers that he must have been travelling fast. If, therefore, it is a case

* Cr. R. C. No. 934 of 1945. 24th January, 1946.
(Cr. R. P. No. 874 of 1945).

of a vehicle that was coming fast near a bend, then it cannot be said that the motor bus driver was wrong in having overtaken the lorry near the bend when he had not seen any obstruction or any inconvenience or danger by this overtaking. This is therefore a case in which the driver of the bus is entitled to the benefit of the doubt and giving him the benefit of the doubt, I set aside the conviction and sentence and acquit him.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Vellai Mudali* .. *Accused.**

Penal Code (XLV of 1860), section 496—Tali tying by use of force—Does not amount to going through the ceremony of being married, knowing that he is not thereby lawfully married.

The accused who wanted to marry a girl but was rejected, waylaid her and pushed her down and tied a *tali* round her neck. He was convicted of an offence under section 496, Indian Penal Code. On a perusal of the calendar by the High Court,

Held, that the act of the accused in tying the *tali* round the neck of the girl in the circumstances did not amount to going through the ceremony of being married, knowing that he is not thereby lawfully married within the meaning of section 496, Indian Penal Code and hence the conviction should be set aside. Moreover, the accused must be presumed to have known full well that according to the custom of the community that act did not constitute a ceremony of being married.

Case taken up by the High Court on perusal of the Calendar and judgment in Sessions Case No. 37 of 1946 on the file of the Assistant Sessions Judge of the Court of Sessions, Coimbatore Division.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

The Court made the following

ORDER.—This case was taken up by this Court on a perusal of the Calendar and notice was given to the Public Prosecutor and the accused. The accused is not represented.

The accused was convicted by the Assistant Sessions Judge of Coimbatore under section 496 of the Indian Penal Code for dishonestly or fraudulently going through the ceremony of being married, without lawful marriage, and was sentenced to rigorous imprisonment for one year. The case against him was that on 31st January, 1946, at about 6 P.M. when the girl, P.W. 2, was returning from her father's house with a head-load of fuel the accused seized her, pushed her down and tied a *tali* round her neck and then let her go. He had intended to marry her but he was rejected and she was about to be married to somebody else. He committed the act apparently to spite the girl and her parents. The facts were not seriously questioned by the accused but the question to be considered is whether even on the showing of the prosecution an offence has been made out under section 496 of the Code. I am definitely of the opinion that the act of the accused in tying the *tali* round the neck of P.W. 2 in those circumstances does not amount to going through the ceremony of being married, knowing that he is not thereby lawfully married within the meaning of section 496 of the Code. The accused must be presumed to have known full well that according to the custom of the community that act did not constitute a ceremony of being married and there is no point in holding that by doing so he went through such a ceremony, knowing that he is not thereby lawfully married. The conviction cannot be sustained and is therefore set aside. The accused is directed to be set at liberty.

K.C. *Conviction set aside.*

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* Cr. R.C. No. 952 of 1946. 1st November, 1946.
(Taken up No. 4 of 1946).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE BELL.

Subramanian Chettiar .. *Appellant**

v.

A. K. A. Ramachandra Reddiar .. *Respondent.*

Madras Agriculturists' Relief Act (*IV of* 1938), *section* 19—*Subsequent purchaser of hypotheca not applying for relief under the Act and not included in the final decree as scaled down—Rights of—Mortgage money as scaled down paid into Court—Effect—Entire mortgage discharged as against mortgagors as well as all the subsequent purchasers.*

The preliminary decree in favour of the mortgagees in a mortgage suit was scaled down under section 19 of the Madras Agriculturists' Relief Act on applications by the mortgagors and subsequent purchasers except the 13th defendant who was a purchaser of portions of the hypotheca from the 9th defendant who was himself a purchaser from the mortgagors of portions of the hypotheca. The preliminary decree was confirmed in appeal by the High Court and the final decree was drawn up for the scaled down amount. The 13th defendant then applied to the High Court to include his name in the final decree but the application was rejected as it was much too late to give effect to his contentions. In the course of the execution proceedings instituted by the decree-holder, the scaled down amount was deposited by the mortgagors and the other interested parties in Court and satisfaction of the decree was entered as far as they were concerned. The 13th defendant then filed an execution application for entering up satisfaction of the decree even as against himself. The 9th defendant also filed an execution application for the same relief as there was an indemnity clause in his sale to the 13th defendant.

Held, (i) that when an agriculturist mortgagor obtains the benefit of the Act and pays the amount of the debt as scaled down, the entire mortgage debt is discharged against all persons interested in the security even though such persons may not be agriculturists entitled to claim relief in their own right under the Act and that the order of the High Court on the 13th defendant's application did not have the effect of denying to the 13th defendant the relief he now sought, for, all that the High Court refused to allow was the prayer to have the decree expressly amended and, from the rejection of that prayer as having come too late it cannot follow that the 13th defendant cannot claim the benefit of the scaling down in other appropriate proceedings, if he is so entitled under the law. Reading the decrees as a whole it was clear that there was no apportionment of the liability as between several sets of defendants and the effect of the payment accordingly was to discharge the decree as a whole even as against the 13th defendant and others who did not apply for the benefit of the Act in their own right.

(ii) Even though the rejection of the application of the 13th defendant would give rise to a claim by way of indemnity against the 9th defendant, it is not sufficient to entitle the 9th defendant to make an application for entering up satisfaction of the decree as against the 13th defendant.

Appeals against the orders of the Court of the Subordinate Judge, Madura, dated 22nd April, 1944, in E.A. No. 91 of 1944 in E.P. No. 138 of 1943 and E.A. No. 104 of 1944 in O.S. No. 20 of 1936 respectively.

T. V. Ramanatha Aiyar and *T. S. Vaidyanatha Aiyar* for Appellant.

The Advocate-General (*K. Rajah Aiyar*) and *V. Seshadri* for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—These two connected appeals arise out of an order refusing to enter up satisfaction of a mortgage decree passed against the appellants and other defendants. The mortgage was granted on the 13th September, 1925. Defendants 1 to 4 were the mortgagors and 5 to 12 were subsequent purchasers of portions of the hypotheca. The 13th defendant is a purchaser of three items out of those purchased by the 9th defendant and he has sold one of these three items to the 14th defendant.

The suit (O.S. No. 20 of 1936) was brought to enforce the mortgage against all these defendants and a preliminary decree for Rs. 1,13,836-4-10 was passed on the 13th September, 1937. The Madras Agriculturists' Relief Act, 1938, having been passed in March, 1938, the mortgagors applied under section 19 to the Court which passed the decree for scaling down the debt in accordance with the provisions of the Act claiming to be agriculturists. Defendants 9 to 12 as well as defendants 5 to 8 also applied by separate petitions for similar relief. The applications of the mortgagors and of the defendants 9 to 12 were allowed and the amount was scaled down to Rs. 36,000. The application of defendants 5 to 8 was rejected on the

* A. A. O. Nos. 410 and 582 of 1944. 8th January, 1946.

ground that they were not agriculturists within the meaning of the Act. They appealed to this Court in A.S. No. 295 of 1939 which was heard with A.S. Nos. 23 and 24 of 1938 preferred against the preliminary decree on questions determined in the suit. These two appeals were dismissed and the preliminary decree was confirmed on 3rd February, 1942. A.S. No. 295 of 1939 was allowed, the Court holding on the strength of a series of decisions, that the mortgagors being agriculturists even though the purchasers of portions of the hypotheca were non-agriculturists, the statutory reduction of the debt under the Act at the instance of the mortgagors enured to the benefit of such purchasers, not by virtue of any provisions of the Act, but under the general law. (Vide *Nachiappa Chettiar* v. *Ramachandra Reddiar*[1].) The liability of defendants 5 to 8 also was thus reduced to the scaled down amount, namely, Rs. 36,000 and the preliminary decree was amended accordingly. The 13th defendant who is the appellant before us in C. M. A. No. 410 of 1944 did not make any application of his own for relief under the Act, although he was an agriculturist because, as he says, he was under the impression that he would have the benefit of the scaling down ordered at the instance of his vendor, the 9th defendant. After the reduction of the decree amount as a result of these applications, the final decree was passed on the 18th March, 1939. The final decree gave effect to the scaling down of the amount only so far as defendants 1 to 4 and 9 to 12 were concerned as the appeal by defendants 5 to 8 was disposed of only on 3rd February, 1942. It is common ground that, consequent on the decision of this Court, the decree was further amended in respect of defendants 5 to 8 also. The 13th defendant and the 29th defendant who was brought on record as the legal representative of the 14th defendant subsequently filed an application (C. M. P. No. 4851 of 1942) in this Court in Appeal No. 24 of 1938 preferred against the preliminary decree and already disposed of as aforesaid, praying that this Court should "amend the decree herein by adding the words 'defendants 13 and 29' in paras. 1 and 2 of the decree of this Honourable Court, dated 3rd February, 1942." The Court rejected that application on the ground that it was "much too late to give effect to defendant 13's contentions now." Subsequently, the decree-holder initiated execution proceedings and in the course of such execution proceedings the scaled down amount, namely, Rs. 36,000 with subsequent interest and incidental charges was deposited in Court at the instance of the defendants 1 to 4 and others who had obtained relief under the Act, and satisfaction of the decree was entered so far as they were concerned. The 13th defendant then filed E. A. No. 91 of 1944 out of which C. M. A. No. 410 of 1944 arises for entering up satisfaction of the decree even as against himself on the ground that the mortgage debt being indivisible and having been discharged by the payment of the scaled down amount by the mortgagors, the whole debt was wiped out and the property purchased by him became automatically freed from the encumbrance. The 9th defendant applied in E. A. No. 104 of 1944 for a similar relief pointing out that in his sale to the 13th defendant there was an indemnity clause under which he was liable to make good to his vendee any loss which the latter might sustain by reason of the decree-holder enforcing his claim against the 13th defendant. The 9th defendant therefore prayed that the entire decree should be entered as satisfied by the payment into Court of the decree amount as scaled down.

The Subordinate Judge while recognising the principle laid down by the decisions of this Court in *Arunachalam* v. *Seetharam*[2], *Marina Ammayi* v. *Mirza Bakhar Beg Saheb*[3] and *Satyanarayanamurthi* v. *Sathiraju*[4], namely, that when an agriculturist-mortgagor obtains the benefit of the Act and pays the amount of the debt as scaled down, the entire mortgage debt is discharged against all persons interested in the security even though such persons may not be agriculturists entitled to claim relief in their own right under the Act, was of opinion that the terms of the preliminary and final decrees as amended as well as the order of this Court rejecting the C.M. P.

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1. (1942) 1 M.L.J. 510.
2. (1941) 1 M.L.J. 561 : I.L.R. 1941 Mad.
3. (1941) 1 M.L.J. 547.
4. (1942) 1 M.L.J. 506.

No. 4851 of 1942 precluded the 13th defendant from claiming that the decree was satisfied by the payment into Court of the reduced amount by the other defendants. Mr. Muthukrishna Aiyar, learned counsel for the 13th defendant, appellant in C. M. A. No. 410 of 1944, contests this view claiming that there is nothing in the decrees to preclude the application of the principle of the decisions referred to above in favour of his client at this stage when the decree amount as scaled down has been paid into Court, and that the order of this Court in C. M. P. No. 4851 of 1942 cannot have the effect of denying to the appellant the relief which he now seeks on the basis of such payment in the execution proceedings. We are inclined to agree that, so far as the order of this Court in C. M. P. No. 4851 of 1942 is concerned, it cannot have the effect of depriving the appellant of the benefit of the reduction of the decree debt effected at the instance of the mortgagors if the appellant is otherwise entitled under the law to such benefit, for all that this Court refused to allow was the prayer of the appellant to have the decree in Appeal No. 24 of 1938, expressly amended so as to give effect to the principle of the decisions referred to above even as regards his own liability under the decree. From the rejection of that prayer as having come too late, it cannot follow that the appellant cannot claim the benefit of the scaling down in other appropriate proceedings if he is entitled to such benefit under the law.

Turning now to the language of the decrees, clause 2 (1) of the preliminary decree as originally passed

"ordered and decreed that defendants 1 to 4, 5 to 13, 15 and 25 to 29 do pay into Court on or before the 13th March, 1938, or any later date up to which time for payment may be extended by the Court, the said sum of Rs. 1,13, 836-4-10 with interest as above."

It then followed the usual lines laid down in the Code and contained directions as to the sale of the properties in case of default, etc. After the applications of the mortgagors, defendants 5 to 8 and 9 to 12 were allowed and the amount was scaled down as aforesaid, to Rs. 36,000 a paragraph was added in the decree in the following terms:

"It is further ordered and decreed that the debt due by defendants 1 to 4, 9th defendant and defendants 5 to 8 is scaled down to the principal sum of Rs. 36,000 with interest at 6¼ per cent. per annum from 1st October, 1937, till 13th March, 1938, and thereafter at six per cent. per annum with full costs of Rs. 3,146-13-6 with interest on costs at six per cent. per annum from 13th September, 1937, to the date of realisation."

The words "defendants 5 to 8" are not found in the printed decree, but it is admitted that they have been added in the decree as finally amended. In the final decree passed on 18th March, 1939, also the amendments were carried out by the insertion of paragraph 3 whereby it was:

"ordered and decreed that out of the items of the hypotheca, the items which are in the possession of defendants 1 to 4 and 9 to 12 be and are liable only for the sum of Rs. 36,000 with interest thereon at 6¼ per cent. per annum from 1st October, 1937, to 13th March, 1938, and thereafter at six per cent. per annum with full costs as allowed under the preliminary decree."

Here too we are told that the words "defendants 5 to 8" have been subsequently added in that para. The rest of the decree as originally passed was in the usual terms. It is argued by the learned Advocate-General for the decree-holder-respondent, that the true effect of these decrees was to fix the liability of each set of defendants separately and independently, so that, when the liability of one set of defendants was reduced by the application of the provisions of the Act and a similar reduction was not expressly made as against other defendants, the decree must be construed as operating in respect of the full amount as originally decreed as regards the latter. We are unable to agree with this view. Reading the decrees as a whole it is clear to our minds that there is no apportionment of the liability under the mortgage as between the several sets of defendants. The decree was for a single amount even as the amount due under the mortgage was a single liability. The amount has no doubt been reduced as regards persons who sought and obtained relief under the Madras Agriculturists' Relief Act. But according to the decisions to which reference has been made already, if the reduced debt of the mortgagor is paid, the hypotheca is freed from the encumbrance as against every person who claims interest in any part thereof. We are unable to see anything

in the language of the decree which prevents us from giving effect to that principle now that the scaled down amount has been admittedly paid by or at the instance of the mortgagors. The effect of such payments must accordingly be held to be to discharge the decree as a whole even as against the others including the 13th and 29th defendants who did not actually apply for the benefit of the Act in their own right as agriculturists. In this view, C. M. A. No. 410 of 1944 must be and is hereby allowed.

As regards C. M. A. No. 582 of 1944, preferred by the 9th defendant, he, as already observed, sought and obtained relief under the Act, and so far as he is concerned, only the scaled down amount was payable under the decree as amended. It cannot therefore be executed for any larger sum against the properties remaining in his possession. But it is difficult to see how he can apply for entering up satisfaction of the decree in respect of the properties sold by him and now in the hands of his vendee the 13th defendant. It may be that the result of rejecting the application of the 13th defendant would give rise to a claim by way of indemnity against the 9th defendant but we do not consider that that is sufficient to entitle the 9th defendant to make an application for entering up satisfaction of the decree as against the 13th defendant. As, however, we are allowing the appeal of the 13th defendant, the 9th defendant practically gets the relief that he wants. His appeal however must fail and we dismiss it. In the circumstances we make no order as to costs in either of the appeals.

V.P.S. *C.M.A. No.* 410 *of* 1944 *allowed.*
C.M.A. No. 582 *of* 1944 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Mandavalli Kamaraja being minor by mother and guardian Mahalakshmamma .. *Appellant**

v.

Kasina Mallayya and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 8—Single creditor—Failure to sue in representative capacity—Power of appellate Court to grant leave to change frame of suit—New plea—Cannot be raised if it involves taking in new evidence.

In a suit to set aside a summary order the question involved was whether an alienation was in fraud of creditors. Though the plaintiff was the only creditor, on an objection being raised as to the frame of the suit the trial Court dismissed the suit as it was not filed in a representative capacity. The first appellate Court granted the plaintiff leave to file it as a representative suit and decreed the suit. On a contention in second appeal that the lower appellate Court ought not to have granted leave to change the frame of suit after the objection was taken and upheld by the trial Court,

Held, that as the failure to sue in a representative capacity was due to a *bona fide* mistake, the first appellate Court was right in granting leave to the plaintiff to sue in a representative capacity.

Madina Bibi v. *Ismail Durga Association*, (1940) 1 M.L.J. 872: I.L.R. 1940 Mad. 808, distinguished.

A new plea that the suit was not maintainable as the subject-matter was governed by section 47 of the Civil Procedure Code cannot be allowed to be raised in the appellate Court for the first time as that would involve the necessity for letting in further evidence and also an investigation into the various alienations.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada in A. S. No. 70 of 1942, preferred against the decree of the Court of the District Munsiff of Cocanada in O. S. No. 85 of 1938.

C. Rama Rao for Appellant.

K. Bhimasankaram and *Vepa P. Sarathy* for Respondents.

The Court delivered the following

JUDGMENT.—The second defendant is the appellant and the appeal arises out of a suit to set aside a summary order and the question involved was whether a particular alienation was valid or not on the ground that it was in fraud of creditors.

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* S.A. No. 738 of 1945. 30th July, 1946.

One of the objections raised was that the suit was not filed in the proper form as it should have been filed as a representative suit on behalf of all creditors. The first Court found that the plaintiff was the only creditor and that it was necessary that the suit should be filed in a representative capacity, and dismissed the suit. On appeal the plaintiff wanted the leave of the Court to file it as a representative suit which was granted and the suit was decreed. In the second appeal it is contended that the lower appellate Court ought not to have granted permission to sue in the representative capacity as objection had been taken even in the first Court and an issue was framed and it was very late after the suit was dismissed by reason of the failure to sue in representative capacity that he thought it necessary to file this application for permission in the appellate Court. Reliance is placed on the decision in *Madina Bibi* v. *Ismail Durga Association*[1]. In that case observations concede that the appellate Court could grant such a permission. At page 814 His Lordship the Chief Justice observes :—

"If the failure to sue in a representative capacity was the result of oversight, the Court might have been disposed in those circumstances to allow the amendment, but that is not the case."

In this case it is not said to be oversight, but it is said to be *bona fide* mistaken impression which led the plaintiff to file the suit without getting permission to sue on behalf of the creditors. As a matter of fact the plaintiff's case was that he was the only creditor and it was not stated for the defendant that there was any other creditor nor is the name of any other creditor mentioned now. If a party knew that he was the only creditor of the alienor he could represent in his own capacity the creditor. So it must have been a *bona fide* mistake. Because the Court found against him, he thought it necessary and safer to apply for permission. In these circumstances I do not think the case in *Madina Bibi* v. *Ismail Durga Association*[1] has any application to the facts of this case. In the circumstances of that case it was considered that leave should not be given in the appellate Court. In this case the circumstances are different and it cannot be said that he was not under a *bona fide* mistake.

It is also urged that the lower appellate Court ought to have given an opportunity to the appellant here to raise a plea that the suit was not maintainable and that the matter was governed by section 47 of the Civil Procedure Code. The learned Judge refused to allow this plea to be raised five years after the suit was filed. It is urged, however, before me that when he gave the permission to sue in a representative capacity after 5 years he should also have allowed this plea to be raised. But then there was no necessity for any further evidence for the granting of the permission to the plaintiff to sue in representative capacity. But the other plea now sought to be raised would involve the necessity for letting in further evidence and an investigation into the various alienations.

In these circumstances I do not think it can be said that the learned Judge was wrong in refusing to allow a plea which involved the necessity of going into the facts about which evidence will have to be let in.

The second appeal fails and is accordingly dismissed with costs. No leave.

V.P.S. — *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

P. Swaminatha Pillai .. *Petitioner**

v.

S. Raghavachariar and others .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 144 and 145—Order rescinding preliminary order under section 144—Proceedings on same day under section 145 and delivery of possession to party found to have been in possession—Order not stating specifically that there was a likelihood of breach of peace—Irregularity—If fatal warranting interference in revision.

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1. (1940) 1 M.L.J. 872 : I.L.R. 1940 Mad. 808 at 814.

*Cr.R.C. No. 67 of 1946. 27th March, 1946.
(Cr.R.P. No. 64 of 1946).

Where a Magistrate who is in full possession of all the facts rescinds the preliminary order under section 144, Criminal Procedure Code, and proceeds to make an enquiry under section 145 and orders possession to be given to the party who was in possession, the mere omission to indicate in his order that a breach of the peace was likely, though an irregularity, is not fatal to the proceedings. It is not a ground for interfering in revision.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate of Kumbakonam dated 31st October, 1945, and made in M. C. No. 25 of 1945.

T. S. Venkatarama Aiyar for Petitioner.

T. M. Kasturi and *T. R. Subramaniam* for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is a petition to revise the order of the Additional First Class Magistrate, Kumbakonam, in proceedings under section 145, Criminal Procedure Code, declaring that the counter-petitioners (the B party) were in possession of the disputed lands and that the petitioner (the A party) was not in possession thereof, and directing the lands to be put in possession of the B party.

These lands are nanja lands in Tirupallathurai village. They are said to belong to one Aravamudha Ayyangar of Hyderabad. The first counter-petitioner is his agent. The petitioner claims to have been in possession of these lands till April, 1945, as his tenant. This is not disputed. On 7th May, 1945, a notice was given by the first counter-petitioner, the agent of the owner, to the petitioner asking him to vacate, alleging that he was in arrears of rent. To that notice a reply was sent by the petitioner on 19th May, 1945, denying that he was in arrears and claiming occupancy rights in the lands. On 24th May, 1945, the first counter-petitioner, the agent, leased the lands to the counter-petitioners 3 and 4 and they are said to have ploughed the lands and raised seedlings thereon. The petitioner then made a complaint to the police on 15th June, 1945, that the counter-petitioners 3 and 4 had interfered with his possession and were creating trouble. The Sub-Inspector inspected the locality and found the counter-petitioners ploughing and he asked counter-petitioners 3 and 4 not to interfere with the lands and plough them. Thereupon a petition under section 144, Criminal Procedure Code, was filed before the Sub-Magistrate by the first counter-petitioner who had leased the lands to counter-petitioners 3 and 4, and the Magistrate passed a preliminary order on 28th June, 1945. On 5th July, 1945, the petitioner appealed against that order to the Sub-Divisional Magistrate and for that order being rescinded. On 14th July, 1945, that order under section 144 (1) was rescinded, and on that very day proceedings were started under section 145 by the Sub-Divisional Magistrate. The properties in dispute were attached, a Receiver was appointed and the properties were put in possession of the Receiver. The enquiry under section 145 went on and the Magistrate came to the conclusion that the counter-petitioners before him (the B party) were in possession of the properties on 14th July, 1945, and directed the properties to be put in their possession.

Two points are urged before me in revision. The first is that the order under section 144, Criminal Procedure Code, which was rescinded and proceedings under section 145, Criminal Procedure Code, were started did not contain any statement that there was a dispute about the properties which is likely to cause a breach of the peace; and the other is that the lower Court had no jurisdiction to appoint a Receiver and direct possession of the properties to him.

As to the first point, it is true that the preliminary order does not specifically mention that a breach of the peace was likely to be caused but then, the Magistrate had started these proceedings under section 145, Criminal Procedure Code, on the very day he rescinded the order under section 144. The Magistrate was in possession of all the material facts to indicate that there was a dispute about possession and a breach of the peace was apprehended. It is also significant that even in

the petition filed by the petitioner before him it was stated that there was likely to be a breach of the peace as he was threatened with dispossession with resort to force. It cannot be said that the Magistrate had no materials before him to be satisfied that there is likely to be a breach of the peace and action would have to be taken. The petitioner before me was aware of those facts. Further he did not take any steps till now to have the proceedings started under section 145, Criminal Procedure Code, quashed.

This is no doubt an irregularity in the procedure; but I do not think it is fatal because there were materials before the Magistrate, materials furnished by the petitioner himself, to indicate that a breach of the peace was likely. Omission to make mention of those materials in the order itself is not fatal to the proceedings. I do not think this is a ground for interfering in revision.

With regard to the second point urged regarding the appointment of a Receiver and directing delivery of possession of the properties to him, I do not think it is necessary to consider this point now that the Receiver has ceased to be a Receiver and no useful purpose will be served by considering the point whether he has been properly in possession of the properties or not.

The petition accordingly fails and is dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Ramaswami and another .. *Petitioners.**

Penal Code (XLV of 1860), section 411—Evidence necessary to base a conviction under section 411—Evidence of Head Constable and alleged information upon which the constable proceeded—Articles found in the house where accused lived—No other circumstance connecting either of the accused with the stolen property—Conviction illegal.

In a case against petitioners convicted under section 411, Indian Penal Code, the evidence upon which the conviction was based consisted of the evidence of a Head Constable on the railway platform who arrested the accused and the seizure of the articles from the house in which they were living on information alleged to have been given by one of the petitioners.

Held, that the mere recovery of certain property from the house of the two petitioners was not sufficient by itself to attribute guilty knowledge to either of them unless there were some other circumstances connecting them with the possession of the property. Except the alleged statement or information given to the Head Constable regarding the stolen property in the possession of the accused there was hardly any legal evidence on which a conviction under section 411, Indian Penal Code, could be justified.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the conviction and sentence of fine passed by the Sub-Divisional Magistrate of Palghat in C.A. No. 45 of 1945, dated 31st December, 1945 (C.C. No. 702 of 1945, S.S. Magistrate Court, Palghat).

T. C. Raghavan for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The conviction of the petitioners rests entirely on the evidence of the seizure of one bale of piece goods from the house in which they were living. It would appear that the seal of a railway wagon was found broken and tampered with on 4th July, 1945, and when the contents were verified two bags of areca nuts and a bale of piece goods were missing. So far as the areca nuts are concerned both the Courts below have absolved the petitioners and it is not necessary to go

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*Crl.R.C. No. 357 of 1946. 22nd August, 1946.
(Crl.R.C. No. 345 of 1946).

into that part of the case. The piece goods bale is said to have been recovered from the petitioners' house on 7th July, 1945 and it is alleged that the seizure was made on information given by the first accused. The evidence relating to the seizure of the articles is somewhat thin. It consists of the evidence of the Head Constable P.W. 10 and P.W. 10's case is that he arrested the petitioners on the railway platform and on information obtained from them he went to the house of the petitioners and found there the bale of piece goods (M.O. 2 series) and seized the same. When P.W. 10 examined the accused it was easy for him to secure the presence of the station masters. He could also have taken them along with him when he went to the house of the petitioners, but he did neither of these things. On the other hand, he did it all on his own and it is only when the seizure was made and he produced the petitioners along with the bale of piece goods on the platform that the two station-masters P.Ws. 5 and 6 were called in to attest the Mahazar that was then prepared. This procedure does not appear to be perfectly regular or at all events satisfactory. Apart from this aspect of the matter, there is one other important consideration. It is not clear from the evidence whether the petitioners 1 and 2 who are admittedly brothers were undivided or whether in that house where the alleged stolen property was discovered there were present persons other than the two petitioners. The mere recovery of certain property from the house in which the two petitioners lived is not sufficient by itself to attribute guilty knowledge to either of them unless there were some other circumstances connecting them with the possession of the property. There is no such circumstance in this case except the alleged statement or information given to the Head Constable. There is really no evidence with regard to that. All that the Head Constable says is that he proceeded to the house of the petitioners on information. What that information was is not disclosed. The Mahazar itself is clearly not admissible in evidence, because it was prepared after the property was found in the house and it was produced by the Head Constable along with the petitioners at the platform. The mere fact of such production in those circumstances shows nothing and does not establish any connection of either of the petitioners with the possession of the stolen properties. This is thus a case where there is hardly any legal evidence against the petitioners on which a conviction under section 411, Indian Penal Code, could be based. Giving them the benefit of this finding, the application is allowed and the convictions and sentences are set aside. The fine, if paid, will be refunded.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE HAPPELL.

Kannan *alias* Raman Nair .. *Appellant**

v.

Valia Meladethil *alias* Vadakke Meladethil Kothamma Nethiar Amma's son Kombi Achan and others .. *Respondents.*

Trusts Act (II of 1882), section 90—Applicability—Mortgagee directed to pay debts inclusive of prior mortgage—Mortgagee to pay certain quantity of paddy to a previous karnavan for maintenance—Omission to discharge prior mortgage—Suit on prior mortgage ending in sale—Purchase of the mortgaged property by subsequent mortgagee himself—Mortgage right whether extinguished—Holder of maintenance claim against mortgaged property —Right to enforce claim against mortgagee.

The managers of a Malabar Edom executed a usufructuary mortgage of the properties of the Edom in favour of the first defendant and subsequently they executed a second mortgage of the same properties in favour of the same party. According to the terms of the first mortgage a certain sum was reserved out of the mortgage money for the payment by the first defendant of certain debts due by the Edom and included therein was a sum due under a prior mortgage. Under the mortgage the first defendant was put in possession of the properties, subject to certain conditions. One of them being that he was to pay to the plaintiff, who was a previous karnavan and a maintenance holder a certain quantity of paddy every year. The first defendant paid off the other debts but did not

* S.A. No. 1045 of 1945. 6th September, 1946.

discharge the amount due under the prior mortgage. The prior mortgagee then filed a suit to enforce the mortgage and having obtained the decree brought the properties to sale and they were purchased by the first defendant himself. The plaintiff sued to enforce his claim for maintenance against the usufructuary mortgage right of the first defendant in the Edom properties. The first defendant contended that the usufructuary mortgage had become extinguished by virtue of the sale of the properties to him in execution of the mortgage decree.

Held, that section 90 of the Trusts Act was applicable to the case and that the first defendant held the properties purchased for his mortgagors subject to the same rights and liabilities as obtained at the date of sale except for the obligation on the part of the mortgagors to pay the expenses, if any, properly incurred by the first defendant.

Held further, that the first defendant's obligation to pay the purappad persisted and the plaintiff was entitled to attach the paddy and recover the amount due to him by sale of the first defendant's right in the property.

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat in A.S. No. 89 of 1944 preferred against the decree of the Court of the District Munsiff, Alathur, in O.S. No. 90 of 1943.

K. Kuttikrishna Menon for Appellant.

D. A. Krishna Variar for the 1st Respondent.

The Judgment of the Court was delivered by

Happell, J.—This is an appeal from the judgment in appeal of the Subordinate Judge of South Malabar at Palghat confirming the decree of the District Munsiff of Alathur in favour of the plaintiff in O.S. No. 90 of 1943. The first defendant in the suit is the appellant.

The plaintiff had been the karnavan of the Kavasseri Vadakke Meledom. By the decree in O.S. No. 35 of 1917 in the Court of the District Munsiff of Alathur, he was removed from the management of the Edom, but the decree at the same time provided that the plaintiff was to be given 300 paras of paddy per annum by the Edom for his maintenance. The karnavan who was appointed in the plaintiff's place was removed by the decree in O.S. No. 14 of 1925 in the District Munsiff's Court of Alathur and defendants 2 and 3 in the present suit were appointed managers in his place. Subsequent to the decree in O.S. No. 35 of 1917 the managers mortgaged the properties of the Edom. On the 1st of November, 1927, they executed a usufructuary mortgage for Rs. 7,350 in favour of the first defendant, and then on the 24th of July, 1929, they executed a second mortgage of the properties for Rs. 4,450 also in favour of the first defendant. According to the terms of the first mortgage to the first defendant, Ex. D-4, dated 1st November, 1927, a sum of Rs. 6,728-2-3 was reserved out of the mortgage money for the payment by the first defendant of certain debts due by the Edom. Included in these debts was a sum of Rs. 1,225 which was due under a prior mortgage. The first defendant appears to have paid off the other debts but he did not discharge the amount due under the prior mortgage. Under the mortgage of 1st November, 1927, the property had been leased back to the Edom. This arrangement proved unsatisfactory, and by the second mortgage of 24th July, 1929, Ex. D-5 the first defendant was put in possession of the properties subject to certain conditions which are set out in the mortgage deed. Out of the total pattom of 2,514 paras and 5 danglis of paddy the first defendant was to pay himself 1,242 paras of paddy in respect of interest on the mortgage money; 666 paras and 6¼ danglis was to be paid by him in respect of Government assessment and michavaram payable to the jenmi; 300 paras of paddy was to be paid to the plaintiff in the present suit in accordance with the terms of the decree in O.S. No. 35 of 1917, and the balance of 305 paras and 8¼ danglis of paddy was to be paid to the Edom. Finally, the deed recited that the mortgage amount was liable for arrears of purappad, interest, etc. As already stated the first defendant never did pay off the prior mortgage although the money was reserved with him and the prior mortgagee one Kunhi Raman Nair filed O.S. No. 79 of 1933 to enforce the mortgage. Defendants 2 and 3 were parties to the suit but allowed it to proceed *ex parte* against them. A decree for sale was passed. The mortgage money was not paid and the properties were brought to sale and purchased by the first defendant.

The plaintiff had recovered the paddy due to him under the decree in O.S. No. 35 of 1917 and the mortgage deed, Ex. D-5, by attachment up to 1934-35. From January-February, 1935, the payments of paddy fell into arrears and he filed E.P. No. 1319 of 1939 in O.S. No. 35 of 1917. In this petition the paddy was attached by means of a prohibitory order and the plaintiff was appointed receiver to collect it. Nothing was realised in pursuance of this execution petition and three years later, the plaintiff filed another petition E.P. No. 829 of 1942. A second prohibitory order was passed and then the plaintiff filed the present suit O.S. No. 90 of 1943 as receiver for the recovery of 2,400 paras of paddy by sale of the usufructuary mortgage right of the first defendant in the Edom properties. The first defendant contested the suit on the ground that the usufructuary mortgages, Exs. D-4 and D-5, had been extinguished by virtue of the sale of the properties to him in execution of the decree in O.S. No. 79 of 1933. He also pleaded that the plaintiff and defendants 2 and 3 were barred from impugning the validity of the auction sale to the first defendant by reason of the proceedings in O.S. No. 79 of 1933 and by reason of the decree in O.S. No. 303 of 1940.

Substantially the ground on which the learned District Munsiff decreed the suit and the learned Subordinate Judge confirmed his decree was that the first defendant had taken advantage of his position as mortgagee to gain an advantage for himself so that under the provisions of section 90 of the Trusts Act he held the advantage for the benefit of the mortgagors, and without much further discussion they concluded from this finding that the two mortgages, Exs. D-4 and D-5, continued to subsist so that the plaintiff was entitled to recover the paddy expressed to be payable to him under the mortgage deed, Ex. D-5. In our opinion the essential questions in the case are whether the first defendant in failing to pay off the prior mortgage and then himself purchasing the property at the Court auction sale took advantage of his position within the meaning of section 90 ; and if the answer to the first question is in the affirmative, what consequences ensue. It will however be convenient to refer to one or two other points before the case is reduced to what we consider to be the essential questions at issue. With regard to the plea of *res judicata*, O.S. No. 79 of 1933 is no bar because the plaintiff was not a party to the suit and because in any case no question as between the first defendant and the managers of the Edom arose in the suit itself. Defendants 2 and 3 had no defence. They had either to pay the mortgage money or to allow a decree for sale to be passed. The other suit O.S. No. 303 of 1940 was, it is true, brought to recover purappad from the first defendant under the terms of the mortgage deed, Ex. D-5 and it was dismissed. The plaintiff was not a party to the suit but the third defendant was. He was not however a party in his capacity as the manager of the Edom but in his private capacity and the decree in the suit cannot bind the Edom. There was also some discussion in the lower Courts as to how far the mortgage deed, Ex. D-5 created a charge on the mortgage for the payment of the purappad and there has been some argument before us on the subject. If the deed gave the plaintiff a charge he would undoubtedly be entitled to enforce it despite the decree in O.S. No. 79 of 1933 and the sale in execution of that decree as he was not a party to that suit. The mortgage deed, Ex. D-5, it seems to us clear, while it gives a charge to the Edom in respect of the purappad payable under the deed does not give any charge to the plaintiff personally. It has been argued by Mr. Kuttikrishna Menon for the first defendant appellant that the charge is in any case only in respect of the purappad payable to the Edom, namely, 305 paras of paddy per annum. We do not accept this construction of the deed. The deed gives a charge in respect of the purappad and the 300 paras made payable to the plaintiff is part of the purappad payable to the Edom by the first defendant although diverted by the terms of the deed to the plaintiff. In any case if the mortgages subsist even after the sale to the first defendant, as there is a charge in respect of the purappad payable to the Edom, there can be no question of limitation.

The argument advanced by Mr. Kuttikrishna Menon for the appellant is first that it was not the case of the plaintiff that the mortgages continued in force despite the Court auction sale because the plaintiff had taken undue advantage

of his position as mortgagee, and no issue was raised on this subject. Secondly that whatever the legal position in consequence of the sale might be as between the first defendant and the managers of the Edom, the rights and liabilities of these parties would have to be worked out in appropriate proceeding. On the face of it the mortgages have been extinguished by the sale to the first defendant, and the plaintiff has no standing which entitles him to bring a suit for recovery of the paddy payable to him under the extinguished mortgages; and thirdly, that even if the first defendant is found to have taken undue advantage as a mortgagee, the consequences under section 90 of the Trusts Act are not those which the lower Courts thought them to be. The sale extinguished the mortgages and the only right given to the mortgagors under section 90 is the right to recover the property on payment of the mortgage money and any expenses legitimately incurred by the first defendant as mortgagee.

In our opinion, there is little substance in the first two points. It is stated specifically in paragraph 16 of the plaint that the first defendant had improperly caused the properties to be sold in auction and had purchased them himself by failing to pay off the mortgage debt as he had undertaken to do, and that "he cannot take advantage of his own wrong." No doubt the legal position was misconceived and it was maintained that by reason of the conduct of the first defendant the sale was void. The question of the consequences which ensued from the first defendant's conduct, however, is covered by the first three issues framed in the suit and was fully canvassed. Mr. Kuttikrishna Menon contends that, in any case, there is no proof that the first defendant availed himself of his position as mortgagee with a view to gaining an advantage by the purchase of the properties at the Court auction sale. The plaintiff of course could not adduce evidence to prove what was in the first defendant's mind but he did point to the circumstances and he cross-examined him, successfully, to show that the price of paddy had not fallen but had risen and he was in a position to discharge the mortgage debt. Both the lower Courts have found that the first defendant refrained from paying off the prior mortgage with a view to purchasing the property himself. Their findings are inferences of fact, and perfectly reasonable inferences. We should certainly not be justified in differing from these findings in second appeal.

With regard to the second point, we do not agree that the plaintiff had no cause of action and that the mortgages must be regarded as extinguished until the rights and liabilities as between the first defendant and the managers of the Edom had been worked out in a properly constituted suit. The managers of the Edom were made parties to the suit as the second and third defendants, and they supported the plaintiff's case. The plaintiff in fact in his execution petition ignored the mortgages and based his claim to the paddy supply on the ground that it was purappad payable to the Edom. But whether he attached the paddy as due to the Edom which was bound to pay it to him under the decree in O.S. No. 35 of 1917 or as due to him under the terms of the mortgage deed Ex. D-5 he was certainly entitled to it unless the first defendant was no longer obliged to pay the paddy because he had become the absolute owner and the mortgages were extinguished. Whether the first defendant had in fact become the absolute owner was an issue which the plaintiff was clearly entitled to raise in a suit for sale of the property to recover the amount due to him. It remains only to deal with the argument that, even if the first defendant availed himself of his position as mortgagee to gain an advantage within the meaning of section 90 of the Trusts Act, the only remedy open to the persons whose interests have been affected is to sue for a reconveyance of the properties after payment of the amount due on the mortgages and the expenses properly incurred by the first defendant as mortgagee. The consequences to the parties of the acceptance of this argument as correct would be that the mortgagors could regain possession of the property on payment of the mortgage money; they would not have to pay more as the first defendant was obliged to discharge the prior mortgage and he retained for himself the excess of the purchase price over the amount required to discharge it but that until this payment was made the first defendant would remain in possession without any obligation to pay the purappad which

under the terms of the second usufructuary mortgage he was bound to pay. The principle embodied in section 90 of the Trusts Act is the principle that a person shall not be allowed to profit from his own wrong. We find it difficult to see how the first defendant would not have been allowed to gain an advantage from his own wrong if the argument advanced by Mr. Kuttikrishna Menon is accepted. He enjoys the property without paying the purappad which he has obliged himself to pay under the deed—Ex. D-5—until the mortgagors can find funds to pay the mortgage money. Mr. Kuttikrishna Menon however argues that the sale is valid so that the mortgages are extinguished and their terms cannot be enforced, and contends that in no reported case will it be found that the mortgagor has been given any remedy except the right to recover the property on payment of the mortgage money and the expenses properly incurred by the mortgagee. In support of his contention he has referred to illustration (*c*) to section 90 of the Trusts Act. Illustration (*c*) runs as follows :

"*A* mortgages land to *B*, who enters into possession. *B* allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to *B*. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, *B* holds the land for the benefit of *A*."

It seems to us that the illustration merely states that the mortgagor retains his equity of redemption and his right to redeem but that in order to redeem he may have to pay the expenses properly incurred by *B* as mortgagee as well as the mortgage money. Section 90 itself provides that a person who has gained an advantage within the meaning of the section "must hold, for the benefit of all persons so interested, the advantage so gained but subject, etc." The Act is the Indian Trusts Act and the meaning of the section clearly is that the person who has gained the advantage holds that advantage as it were in trust for the persons over whom the advantage has been gained. In the present case what is the advantage gained by the first defendant? If the second and third defendants had no remedy, he has obtained an absolute interest in properties which he had previously only enjoyed, subject to the mortgagor's equity of redemption and the obligation to pay them 605 paras of paddy per annum. In our judgment on a proper construction of section 90 the first defendant does not merely hold the land until the mortgagors choose to pay the amount due under the mortgage and any expenses that he may properly have incurred as mortgagee; he holds the lands for the benefit of the mortgagors according to their interests at the date of sale which will include the right to receive 605 paras of paddy annually.

Among the cases cited, it is true, there is no case directly in point in the sense that a mortgagor has been permitted to enforce a term of the mortgage as if the mortgage subsisted unaffected by the sale to the mortgagee. This, however, would seem to be because this question has not precisely arisen. On the other hand in only one of the cases cited *Deo Nandan Prashad* v. *Janki Singh*[1] was the suit brought merely for the reconveyance of the property sold in consequence of the advantage taken by the mortgagee. In the other cases the suits were brought for redemption either under section 90 of the Trusts Act or on general principles of equity. That is, they were brought on the footing that the mortgage subsisted despite the sale, and they were decided on the principle that where the mortgagee had taken undue advantage the mortgagor's equity of redemption was not lost by reason of the sale to the mortgagee. In *Babaji* v. *Magniram*[2], for instance, the Forest Department wanted certain land for its own purposes which was in the possession of a mortgagee. In the absence of the mortgagor the Government revenue was deliberately allowed to fall in arrear, the land was forfeited to Government, and the mortgagee was given other land S. No. 105—as compensation. On a suit by the successor in interest of the mortgagor it was held that he was entitled to redeem S. No. 105 as the mortgagee had lost the equity of redemption in the mortgaged land by fraud so that the land which he had obtained in exchange was subject to the mortgage. In *Arokiam Asari* v. *Vavana Rowthan*[3], the fifth defendant had obtained an othi

1. (1916) 32 M.L.J. 206 : L.R. 44 I.A. 30 : I.L.R. 44 Cal. 573 (P.C.).
2. (1895) I.L.R. 21 Bom. 396.
3. (1926) 52 M.L.J. 135.

over part of the property mortgaged by first defendant to the plaintiff. Owing to default on the part of the fifth defendant in paying the Government revenue the property was brought to sale and purchased by the fifth defendant himself. Subsequently, the first defendant acknowledged his liability under the mortgage in favour of the plaintiff and the question in the case was whether this acknowledgment affected the fifth defendant and his representatives. Reilly, J., held that it did and that under section 90 of the Trusts Act, the fifth defendant must hold the land subject to the plaintiff's mortgage. *Chhita Bhula* v. *Bai Jamni*[1], *Lakshmayya* v. *Appadu*[2], *Jaikaran Singh* v. *Sheo Kumar Singh*[3], are all cases in which it was held that the mortgagor's equity of redemption subsisted despite the sale to the mortgagee who had taken advantage of his position as such.

Deo Nandan Prashad v. *Janki Singh*[4], the case to which reference has already been made, is relied on by Mr. Kuttikrishna Menon because in this case the suit was brought for the reconveyance of the properties. It seems clear to us that the suit was brought for reconveyance of the properties sold to the mortgagee because that was the only remedy open to the plaintiffs who were principally aggrieved. They were not mortgagors at all. The co-sharers in possession of a three annas share in a twelve annas share of certain property had mortgaged their three annas share with possession to a minor. The guardian of the minor allowed the Government revenue to fall into arrear and then when the whole twelve annas share was put up for sale by Government purchased it for the minor. The only remedy open to the co-sharers in respect of the other nine shares was to sue for reconveyance of payment of contribution. No doubt a decree was also made for reconveyance of their shares to the mortgagors. Nothing, however, was said of their mortgage and it may be presumed that having paid their share of the contribution the position between them and their mortgagee was as before. The mortgagee would remain in possession while the mortgagors of the three annas share retained their equity of redemption. In the course of his judgment in *Deo Nandan Prashad* v. *Janki Singh*[4], Sir Lawrence Jenkins said that the sale stood but that in the circumstances the transaction was nothing more than the payment of an arrear of revenue enuring for the benefit of all. In our judgment, in the present case, although the sale to the mortgagee stands it is in effect nothing more than a discharge of the prior mortgage which he was bound to make and which enures for the benefit of the mortgagors.

For the reasons given we are of opinion that the first defendant holds the property for his mortgagors subject to the same rights and liabilities as obtained at the date of sale except for the obligation on the part of the mortgagors to pay the expenses, if any, properly incurred by the first defendant. That being so the first defendant's obligation to pay the purappad persisted, and the plaintiff was entitled to attach the paddy and recover the amount due to him by sale of the first defendant's right in the property.

The appeal is dismissed with costs.

B.V.V. *Appeal dismissed.*

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1. (1916) I.L.R. 40 Bom. 483.
2. (1883) I.L.R. 7 Mad. 111.
3. (1927) I.L.R. 50 All. 36.
4. (1916) 32 M.L.J. 206 : L.R. 44 I.A. 30 : I.L.R. 44 Cal. 573 (P.C.).

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Fort William in Bengal.)

PRESENT :—LORD THANKERTON, LORD DU PARCQ AND SIR MADHAVAN NAIR.

Srimati Bibhabati Devi .. *Appellant**

v.

Kumar Ramendra Narayan Roy and others .. *Respondents.*

Privy Council—Practice—Concurrent judgment of two Courts on a pure question of fact—Review of evidence for a third time—If and when justified—Evidence Act (I of 1872), sections 3, 59, 60 and 114—Admissibility of evidence of statement of fact and request made to witnesses—Person who made the statement and request, not identified and not called as a witness—Fact not a relevant fact unless made a relevant fact by resort to a presumption under section 114—Presumption of authority to make the request—Limitation Act (IX of 1908), Article 144—Possession of Hindu widow of the estate of her husband whom she supposed to be dead but who was not in fact dead—Not adverse to the husband who is found to be alive.

In the case of the concurrent judgment of two Courts on a pure question of fact, the practice of the Privy Council is to decline to review the evidence for a third time, unless there are some special circumstances which would justify a departure from the practice. Though there can be no doubt that the later decisions of the Board have somewhat modified the earlier form of the practice, on a review of them the following propositions may be derived as to the present practice of the Board and the nature of the special circumstances which will justify a departure from the practice :

(1) That the practice applies in the case of all various judicatures whose final tribunal is the Board.

(2) That it applies to the concurrent findings of fact of two Courts and not to concurrent findings of the judges who compose such Courts. Therefore, a dissent by a member of the Appellate Court does not obviate the practice.

(3) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.

(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand ; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding is such a question of law.

(5) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6) That the practice is not a cast iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the Courts of that country.

(8) That the practice relates to the findings of the Courts below, which are generally stated in the order of the Court, but may be stated as findings on the issue before the Court in the judgments provided that they are directly related to the final decision of the Court.

Case-law reviewed.

The evidence of a group of witnesses was to the effect that when they were seated in the common room of the Lewis Jubilee Sanitarium before dinner chatting, a man came with the news that *K* was just dead, and he made a request for men to help to carry the body for cremation. One of such witnesses had a distinct recollection of this request as the news broke in upon the talk they were having and the thing had stuck in his memory. The man who so came into the common room had not been identified and was not a witness. On a question whether the evidence of this group of witnesses was admissible in evidence where the crucial question at issue was the time of death of *K*,

Held, that the statement and request made by the man was a fact within the meaning of sections 3 and 59 of the Indian Evidence Act and that it was proved by the direct evidence of witnesses who heard it, within the meaning of section 60 ; but it was not a relevant fact unless the learned Judge was entitled to make it a relevant fact by a presumption under the terms of S. 114 of the Act. As regards the statement that *K* had just died, such a statement by itself would not justify any such presumption, as it might rest on mere rumour, but it can be held in relation to the fact of the request for help to carry the body for cremation, that it was likely that the request was authorised by those in charge at the residence of *K*, having regard to "the common custom of natural events, human conduct and public and private business" and therefore to presume the existence of such

* P. C. Appeal No. 17 of 1945. 30th July, 1946.

authority. When such presumption is made, the fact of such an authorised request became a relevant fact, and evidence of that group of witnesses became admissible.

Where on the supposed death of her husband, his widow entered on her widow's estate in the undivided share of an estate which belonged to her husband and she thereafter enjoyed it for a period much exceeding the twelve years, on the question whether her possession was adverse to her husband, who was in fact alive,

Held, that possession must be adverse to a living person and as the widow was possessing under a mistake as to her husband's death she cannot claim that by her possession she was asserting a right adverse to one whom she regarded as dead.

W. W. K. Page, K.C. and *P. C. Ghose* (Advocate) for Appellant.

D. N. Pritt, K.C., U. Sen Gupta, R. K. Handoo and *A. Guha* for Respondents.

Their Lordships' Judgment was delivered by

LORD THANKERTON.—This is an appeal by special leave from a decree of the High Court of Judicature at Fort William in Bengal, dated November, 25, 1940, dismissing an appeal against a decree of the First Additional District Judge, Dacca, dated the 24th August, 1936.

The present suit was instituted in the Court of the First Subordinate Judge at Dacca on the 24th July, 1930, by the respondent Kumar Ramendra Narayan Roy (hereinafter referred to as the plaintiff) against the present appellant and others. In the plaint, as subsequently amended on the 15th April, 1931, the plaintiff sought (*ka*) a declaration that he is Kumar Ramendra Narayan Roy, the second son of the late Rajah Rajendra Narayan Roy of Bhowal and (*ka* 1), that his possession should be confirmed in respect of the one-third share of the properties described in the schedule, or, if from the evidence and under the circumstances plaintiff's possession thereof should not be established, then possession thereof should be given to him. He further asked for injunctions against obstruction to his possession. The present appellant filed a written statement denying, *inter alia*, the identity of the plaintiff with Kumar Ramendra Narayan Roy (hereinafter referred to as the Second Kumar), and alleging that the suit was barred by limitation. Issues were adjusted, and those now relevant are,

2. Is the suit barred by limitation?

4. Is the Second Kumar Ramendra Narayan Roy alive?

5. Is the present plaintiff the Second Kumar Ramendra Narayan Roy of Bhowal?

After a very long trial lasting for 608 days, the First Additional District Judge delivered an elaborate and careful judgment in favour of the plaintiff on the 24th August, 1936, and by his order of the same date he ordered and decreed:

"That it be declared that the plaintiff is the Kumar Ramendra Narayan Roy, the second son of the late Rajah Rajendra Narayan Roy, Zamindar of Bhowal, and that he be put in possession of an undivided one-third share in the properties in suit—the share now in the enjoyment of the first defendant (the present appellant)—jointly with the other defendants' possession over the rest."

On an appeal by the present appellant, the appeal was heard by a Special Bench of the High Court, consisting of Costello, Biswas and Lodge, JJ., and by decree dated the 25th November (Lodge, J., dissenting) it was ordered and decreed

"in accordance with the opinion of the majority of the Judges that the judgment and decree of the Court below be and the same are hereby affirmed and this appeal dismissed."

It will be convenient to re-state the short account of the family history in the judgment of the trial Judge :—Rajah Rajendra Narayan Roy, the Zamindar of Bhowal, one of the largest landed proprietors of East Bengal died on the 26th April, 1901. The title was personal, but the family was old, and though not entitled to fame, regarded as the premier Hindu Zamindar family of Dacca. The family-seat is at Jaidebpur, a village about 20 miles from Dacca and situate in the Pargana of Bhowal, a large and fairly compact estate, spreading over the districts of Dacca and Mymensingh. The Rajah had a residence at Dacca, but he ordi-

narily lived in his family home, and was undoubtedly a local magnate of the highest position and influence. The rent-roll of the estate was Rs. 6,48,353 in 1931. It could not have been much less in the Rajah's time.

The Rajah died leaving him surviving, his widow, Rani Bilasmani and three sons and three daughters. The sons were: Ranendra Narayan Roy, Ramendra Narayan Roy and Rabindra Narayan Roy. These, mentioned in order of seniority, were known as Bara Kumar, Mejo Kumar and Chhoto Kumar. The daughters were Indumayee, Jyotirmoyee and Tarinmoyee. Indumayee was the eldest child, Jyotirmoyee the second, then had come the sons and then the youngest child, Tarinmoyee Debi.

The Rajah had executed before his death a deed of trust and a will, and, though the exact terms of these are not known, their result, as agreed, was that the estate, upon his death, vested in the Rani, his widow, in trust for the three sons. She managed as trustee till her death which took place on the 21st January, 1907. Upon that event, the three sons became the owners at law, as they had been in equity; and there is no question that the Second Kumar owned a third share in the estate, and would be owning it still, if he be alive, unless he has been prescribed against for the requisite period.

The three Kumars, after the death of their mother, as before, lived as an undivided Hindu family, joint in mess, property and worship. The eldest Kumar was married in 1901 to Sarajubala Debi, the second defendant in this suit. The Second Kumar was married in 1902 to Bibhabati Debi, the present appellant, and the Third Kumar in 1904 to Ananda Kumari Debi, the fourth defendant in this suit. The family lived at Jaidebpur, and the three sisters, all married, lived as members of the family. Another member of the family was the grandmother, Rani Satyabhama, who had survived her son Rajah Rajendra. The Rajah had a sister, Kripamoyee, who survived him, and who was practically a member of the family, though she lived in a separate block with her husband. The First Kumar died in 1910; the Third Kumar died in 1913, and his widow, the fourth defendant, adopted in 1919 a son, Ram Narayan Roy, who is the third defendant. Indumayee and Kripamoyee died in 1920, and Satyabhama died in 1922.

A brief outline of the contentions of the parties is as follows:—There is no dispute that the Second Kumar and the appellant, with a large party went from Jaidebpur to Darjeeling in April, 1909, arriving at the latter place on the 20th April, and took up their residence at a house called "Step Aside," which had been rented for their stay; and, further, that at that time the Second Kumar had gummatous ulcers on or about both elbows and on his legs, being the tertiary stage of syphilis, which he had contracted at some date subsequent to 1905. It is also agreed that he was taken for dead on the 8th May, 1909. The appellant maintains that the Second Kumar died shortly before midnight and that the following morning his body was taken in a funeral procession and was cremated with the usual rites at the new *sasan* at Darjeeling. The plaintiff admits that there was a funeral procession and cremation on the morning of the 9th May, but maintains that the body so cremated was not that of the Second Kumar; his case is that the Second Kumar was taken for dead about dusk, between seven and eight o'clock, in the evening of the 8th May, that arrangements were at once made for cremation, that the body was taken in funeral procession to the old *sasan*, and placed in position for cremation, when a violent storm of rain caused the party to take shelter, and that, on their return after the rain had abated, the body was no longer there; that thereafter another body was procured and taken to "Step Aside", and was the subject of the procession and cremation the following morning.

On the 10th May, the appellant, with the rest of the party, left Darjeeling for Jaidebpur, where she had her ordinary residence until April, 1911, when she left for Calcutta, to live there permanently with her mother and brother Satyendra in a rented house. She began to enjoy her widow's estate in the undivided one-third share of the Bhowal estate, which the Second Kumar had owned, and

she recovered the proceeds amounting to Rs. 30,000, of a life policy taken out by the Second Kumar, the necessary certificates of his death having been provided. Soon after her departure for Calcutta, the Court of Wards took charge of the appellant's share of the Bhowal estate, and an attempt by her to obtain its release having been unsuccessful, her share remained in charge of the Court of Wards up to the time of the decree in the present suit.

On the other hand, the plaintiff's case is that while the funeral party were sheltering from the storm, he was found to be still alive by four *Sanyasis* (ascetics), who were nearby and had heard certain sounds from the *sasan*, and who released him and took him away, looked after him and took him with them in their wanderings; that when he had recovered from an unconscious state, he had lost all memory of who he was, where he came from and of past events. He lived and garbed himself as a *sanyasi* would, smeared himself with ashes and grew long matted hair and a beard. Some eleven years later he recalled that he came from Dacca, but not who or what he was; that in December, 1920, or January, 1921, he reached Dacca, and took up a position on the Buckland Bund, a public walk on the margin of the river Buriganga, at Dacca, where people promenade morning and evening, for pleasure or health. He could be found seated at the same spot, day and night, with a burning *dhuni* (ascetic's fire) before him. Then followed a period of gradual recognition or suspicion of him as the Second Kumar by certain people, which culminated in the removal of the ashes, and after greatly increased recognition of him as the Second Kumar by relatives and others, a declaration by him of his identity as the Second Kumar in the presence of many people on the 4th May, 1921, and that mainly on the insistence of his sister Jyotirmoyee, who accepted him as such and was one of his principal witnesses. It is unnecessary, for the present purpose, to say anything about the very large body of evidence, oral and documentary, as to recognition of the plaintiff as the Second Kumar, or as to his identity with the Second Kumar, mentally, culturally, or physically. It may be added that both the trial Judge and the Judges of the High Court had the advantage of a personal inspection of the plaintiff, which would not be available to this Board.

The appellant is at once faced with the concurrent judgments of two Courts on a pure question of fact, and the practice of this Board to decline to review the evidence for a third time, unless there are some special circumstances which would justify a departure from the practice. Their Lordships propose to review the decisions of the Board to ascertain the practice as it now stands, as there can be no doubt that the later decisions have somewhat modified the earlier form of the practice, and also in order to discuss the nature of the special circumstances which will justify a departure from the practice.

The earliest case to which reference may be made is *Mudhoo Soodun Sundial* v. *Suroop Chunder Sirkar Chowdhry*[1], Dr. Lushington, in delivering the judgment of the Board, said:

> "Both the Courts below have decided against the validity of the instrument; a fact which considering the advantages the Judges in India generally possess, of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favour of the correctness of their decisions, but does not, and ought not, to relieve this, the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case."

A similar statement was made by Lord Kingsdown, who delivered the judgment in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo*[2] and by Lord Cairns, in delivering the judgment in *Tarseny Churn Bonnerjee* v. *Maitland*[3] in which he states that the Courts below were unanimous.

In November, 1886, in the judgment of the Board, consisting of Lord Fitzgerald, Lord Herschell and Sir Barnes Peacock, in *Allen* v. *Quebec Warehouse Company*[4], Lord Herschell, who delivered the judgment, said:

1. (1849) 4 M.I.A. 431 at 433.
2. (1861) 9 M.I.A. 66 at 87.
3. (1867) 11 M.I.A. 317 at 338: 20 E.R. 121.
4. (1886) 12 A.C. 101 at 104.

"Their Lordships having arrived at the conclusion that there has been no error in point of law, the sole question that remains for determination has been whether the judgment of the Court below ought to be reversed on the ground that the Judges have taken an erroneous view of the facts. Now, it has always been the view taken by this Committee, in advising Her Majesty, when the question for determination has been whether the concurrent judgment of the Judges who have been unanimous below should be supported or reversed, that unless it be shewn with absolute clearness that some blunder or error is apparent in the way in which the learned Judges below have dealt with the facts, this Committee would not advise Her Majesty that the judgment should be reversed. That principle has been laid down in many cases."

After a reference to *Naraguniy's case*[1] and *Tareeny's case*[2], Lord Herschell proceeds :

"Their Lordships entirely adhere to the views thus expressed, and therefore they do not consider that the question they have to determine is, what conclusion they would have arrived at if the matter had for the first time come before them, but whether it has been established that the judgments of the Courts below were clearly wrong."

In the cases so far cited, the Board examined the evidence, but a month later than the decision in *Allen's case*[3], a Board consisting of Lord Hobhouse, Sir Barnes Peacock and Sir Richard Couch, decided the case of *Thakur Harihar Buksh* v. *Thakur Uman Parshad*[4], Lord Hobhouse, in delivering the judgment, said :

"Therefore their Lordships have not considered it proper to go through the mass of oral evidence given in this case, because, if the Courts below concur in their conclusion upon such a matter as a family custom, their Lordships are very reluctant to disturb the judgment of those Courts. If there had been any principle of evidence not properly applied ; if there had been written documents referred to on which the appellant could shew that the Courts below had been led into error, their Lordships might re-examine the case ; but in the absence of any such ground they decline to do so."

In 1894, in *Umrao Begam* v. *Irshad Husain*[5], Lord Hobhouse, who delivered the judgment, said :

"This is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs. Their Lordships would be specially unwilling in such a case to depart from the general rule, which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts. The counsel for the appellant frankly admitted that they laboured under this difficulty, and that they must find some ground of law or general principle for impugning the decree. To do this, they made some comments on the use made by the Courts below of Raza's oral statements ; but these comments all resolved themselves into objections to the weight of evidence, and did not affect its admissibility."

A similar opinion was expressed in *Kunwar Sanwal Singh* v. *Rani Satrupa Kunwar*[6], In *Rani Srimati* v. *Khajendra Narain Singh*[7], Lord Lindley, in delivering the judgment, said :

"The case is unquestionably one of great difficulty, but the appellants have failed to shew any miscarriage of justice, or the violation of any principle of law or procedure. Their Lordships, therefore, see no reason for departing from the usual practice of this Board of declining to interfere with two concurrent findings on pure questions of fact."

That the practice equally applies where there is a dissent in the Appellate Court is made clear by two cases. In *Atta Kwamin* v. *Kobina Kufuor*[8], Lord Kinnear, in delivering the judgment, said :

"Their Lordships have seen no sufficient reason for disturbing the judgment in this case. It raises some questions of considerable difficulty. But the difficulties are occasioned by the obscurity of the facts ; and the learned Judge's below, from their familiarity with the customs and sentiment of the natives, have an advantage for dealing with the evidence which is wanting to this committee. In such a case, it would not be consistent with an approved rule to reverse the concurrent judgments of two Courts, unless 'it be shewn with absolute clearness,' to use the language of Lord Herschell, 'that some blunder or error is apparent in the way in which the learned Judges below have dealt with the facts.' It is true that Lord Herschell's rule applies in terms to those cases only in which the

1. (1861) 9 M.I.A. 66.
2. (1867) 11 M.I.A. 317.
3. (1886) 12 A.C. 101.
4. (1886) L.R. 14 I.A. 7 : I.L.R. 14 C. 296 (P.C.).
5. (1894) L.R. 21 I.A. 163 at 166 : I.L.R. 21 C. 997 (P.C.).
6. (1905) 16 M.L.J. 77 : L.R. 33 I.A. 53 at 54 : I.L.R. 28 All. 215 (P.C.).
7. (1904) L.R. 31 I.A. 127 at 131 : I.L.R. 31 C. 871 (P.C.).
8. A.I.R. 1914 P.C. 261.

Judges have been unanimous; and one of the Judges of the Court of Appeal has dissented in the present case. But this ought not to detract from the weight which is due to the opinion of the majority on the matter of fact, since the dissent is not based on a different view of the evidence, which indeed the learned Judge has hardly considered, but upon grounds of law which their Lordships are unable to adopt."

And in *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury*[1], Lord Dunedin, delivering the judgment, said:

"These two learned Judges form a majority of the Appellate Court. That makes a concurrent finding, and it is not vitiated as such because, as here, the other Judge in the Appellate Court does not come to the same conclusion in fact though coming to the same result in law arising from another fact. Of course, to be concurrent findings binding on this Board, the fact or facts found must be such as are necessary for the foundation of the proposition in law to be subsequently applied to them."

The concurrent finding there referred to by Lord Dunedin was that the existence of a marriage was disproved. Counsel for the appellant then argued that, assuming he could show a good acknowledgment of legitimacy, that conferred the status of legitimacy and made it irrelevant to enter into any enquiry as to the fact of marriage. On this Lord Dunedin says:

"The case might be disposed of by holding, as the majority of the learned Judges of the Appellate Court did, that there was no proper acknowledgment of legitimacy. There is not, however, as to this a concurrent finding, for the learned trial Judge thought otherwise, and it would be necessary to examine the evidence before coming to the above conclusion."

A very important statement as to this practice of the Board was made by Lord Dunedin, in delivering the judgment in *Robins* v. *National Trust Company*[2]:

"The rule as to concurrent findings is not a rule based on any statutory provision. It is rather a rule of conduct which the Board has laid down for itself. As such it has gradually developed. The judicature which has given greatest occasion for its development has undoubtedly been the judicature of India, but the principle is not in any way limited in its application to Indian legislation or Indian Law, be it Hindu or Moslem, as such. Indeed, it is obvious that if such a rule is a good rule to be applied to the findings of the Courts in India, there could be no reason for suggesting that the findings of the Courts of our great self-governing Dominions should be entitled to less consideration. Their Lordships wish it to be clearly understood that the rule of conduct is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is this Board."

Later, referring to the use of the phrase, "miscarriage of justice" used in two earlier judgments of the Board, Lord Dunedin says:

"There was a faint attempt made in the present case to argue that what the appellant considered a quite inadequate appreciation and an unjustifiable belittling of a certain witness whom he regarded as all important would amount to a miscarriage of justice. The expression means no such thing. It means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all. There is, however, also another way of preventing the application of the rule. If it can be shewn that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case there is no finding at all."

Later (at p. 521), Lord Dunedin says:

"Much was sought to be made of the unfair way in which the appellant argued, the trial Judge had treated the evidence of a certain Dr. Shurly. Some of the criticisms he made do not particularly recommend themselves to their Lordships, but in the end he came to his result on a consideration of the whole evidence. That the Court of Appeal looked at the evidence in rather a different way matters not, for the rule is a rule as to concurrent findings, and not a rule as to concurrent reasons."

Thus in *Ram Anugra Narain Singh* v. *Choudhry Hanuman Sahai*[3], the judgment of the Board states:

"The rule (as to concurrent findings) is none the less applicable because the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence."

The fact that the trial Judge based his finding on the oral evidence, while the High Court based their similar finding on the documentay evidence does not take the case out of the rule as is settled by *Ram Anugra Singh's case*[3], just cited by Lord Dunedin and *Bhagwan Singh* v. *Allahabad Bank*[4].

1. (1921) 40 M.L.J. 510 : L.R. 48 I.A. 114 at 119 : I.L.R. 48 Cal. 856 (P.C.).
2. (1927) A.C. 515 at 517.
3. (1902) L.R. 30 I.A. 41 at 43 : I.L.R. 30 C. 303.
4. (1926) L.R. 53 I.A. 268 : I.L.R. 48 All. 763 (P.C.).

At the request of their Lordships, Mr. Page, on behalf of the appellant, dealt with the cases in which the special circumstances were held to justify a departure from the practice of the Board, and which their Lordships will now consider. In *Guthrie* v. *Abool Mozuffer*[1], in which the High Court had merely stated that they saw no reason to differ from the finding of the Zillah Judge, and which related to an allegation of duress by the purchaser in obtaining a deed of sale, it was held by the Board that the findings of the Zillah Judge were incomplete, as there was no finding as to the payment of the consideration, that the inferences of the Zillah Judge from the facts before him could not be justified, and that his judgment treated the judgment of the Cazee as reversed whereas it was confirmed on appeal. That case was very special, and can have no bearing on the present case. In *Hay* v. *Gordon*[2], it was held by the Board that under the provisions of the Statute of Limitations (Act XIV of 1859) there were not separate judgments, as the decision of the trial Judge was not binding until confirmation by the High Court. This case is also of no assistance in the present case.

In *Venkateswara Iyan* v. *Shekhari Varma*[3], Sir Arthur Hobhouse, who delivered the judgment, said:

> "It is true that upon this question there are concurrent decisions of the Courts below. But though the question may be called in its result one of fact, its decision turns upon the admissibility or value of many subordinate facts, and involves the construction of documents and other questions of law."

Their Lordships are unable to hold, under the practice as now modified, that the question of the value of evidence, as apart from its admissibility, can constitute a reason for departure from the practice. In *Thakur Harihar Buksh* v. *Thakur Uman Parshad*[4], Lord Hobhouse, whose judgment as to the alleged family custom has already been cited, proceeds:

> "Then the question comes back to the construction of the *razinamah*, and that again is divided into two branches. The Courts below have found that the *razinamah* ought to be construed to give an absolute interest, because it has been decided that it should be so construed,—in fact that the matter is *res judicata*. Upon that point it is unnecessary for their Lordships to pronounce any opinion; but they wish it to be understood that they do not express any agreement with the Court below on this point, and it must be taken that, not having heard the argument on the other side, their minds are completely open upon it. They rest their opinion upon the terms of the *razinamah* itself."

Their Lordships then said that the *razinamah* did confer an absolute interest, and they agreed with the decision of the Courts below, though not for the same reasons. This was a question of law, which was essential to the decision.

In *Chitpal Singh* v. *Bhairon Bakhsh Singh*[5], Lord Macnaghten, who delivered the judgment, said:

> "It was urged that the Court had drawn a wrong inference from documents before it, and that this error had led to a miscarriage of justice. After all, however, it turns out that the case is an ordinary case of the concurrence of two judgments on a mere question of fact, involving many considerations, on some of which the two Courts are not agreed. But the mere fact that the two Courts do not agree on all the steps which lead to one and the same conclusion is no reason for disregarding the well-known rule. The rule, however, is not an absolute rule; it presses upon the appellant with more or less weight, according to the circumstances of the case, and no doubt the fact that the Courts have differed on some important but subordinate questions is a matter to be taken into consideration in determining whether the evidence before the lower Courts should be reviewed in detail."

Their Lordships are of opinion that, under the practice as subsequently modified, the latter part of that statement—as a general statement—is too wide. *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*[6] was a case of no evidence, and a decision that there is no evidence to support a finding is a decision of law. *Chaudri Satgur Prashad* v. *Kishore Lal*[7] was a case of legal inference from documents and not of

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1. (1871) 14 M.I.A. 53.
2. (1872) L.R. I.A. Supp. Vol. 106.
3. (1881) L.R. 8 I.A. 143 at 150: I.L.R. 3 Mad. 384.
4. (1886) L.R. 14 I.A. 7 at 16: I.L.R. 14 Cal. 296 (P.C.).
5. (1905) 16 M.L.J. 76: I.L.R. 28 All. 219 at 222 (P.C.).
6. (1914) 27 M.L.J. 80: L.R. 41 I.A. 110: I.L.R. 41 Cal. 972 (P.C.).
7. (1919) 38 M.L.J. 259: L.R. 46 I.A. 197: I.L.R. 42 All. 152 (P.C.).

finding of fact. In *Tilakdhari Singh* v. *Kesho Prasad Singh*[1] it was held that, though the concurrent findings proceeded upon the examination of titles and facts, the rule applied. Lord Shaw, who delivered the judgment, said :

"There is no ground for the suggestion that the Judges of the Courts below failed in this duty or introduced illegitimate considerations into their view upon the titles and the facts. They having done that which was strictly their duty, their Lordships are of opinion that what remained was a question of fact."

The appeal was dismissed upon the ground of incompetency, a ground which is not in accordance with the usual procedure of the Board, which simply dismisses the appeal.

In *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills, Ltd.*[2], Lord Dunedin, who delivered the judgment, said :

"The present appeal is brought by special leave. Their Lordships think it necessary to say that it must have been conveyed to their Lordships who granted the leave, that the case raised an important and general question. Speaking generally a patent case has to do with the construction and the infringement of one or more particular patents, and it cannot often be said that any general question is thereby raised. In such cases where there have been concurrent judgments of the Judge of first instance and the Court of Appeal their Lordships would deprecate the idea that leave should be given to appeal to the King in Council."

The practice in regard to patent cases, which is more fully explained in the ensuing part of the judgment, allows a departure from the practice, where the trial Judge, being judge both of fact and law, has misdirected himself in law, and patent cases thus are subject to the general practice.

From this review of the decisions of the Board, their Lordships are of opinion that the following propositions may be derived as to the present practice of the Board and the nature of the special circumstances which will justify a departure from the practice :—

(1) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.

(2) That it applies to the concurrent findings of fact of two Courts, and not to concurrent findings of the judges who compose such Courts. Therefore, a dissent by a member of the Appellate Court does not obviate the practice.

(3) That a difference in the reasons which bring the Judges to the same finding of fact will not obviate the practice.

(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand ; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding is such a question of law.

(5) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the Courts of that country.

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1. (1925) 48 M.L.J. 611 (P.C.). 2. A.I.R. 1929 P.C. 38 at 39 (P.C.).

(8) That the practice relates to the findings of the Courts below, which are generally stated in the order of the Court, but may be stated as findings on the issues before the Court in the judgments provided that they are directly related to the final decision of the Court.

In this appeal the concurrent finding of fact is as follows :

"It is declared that the plaintiff is the Kumar Ramendra Narayan Roy, the second son of the late Rajah Rajendra Narayan Roy, zamindar of Bhowal."

It was for the plaintiff to prove that he is the Second Kumar, and, in order to do so, he had to survive various tests, any one of which, if he failed to surmount it, would almost inevitably destroy his whole case. In these circumstances, in the opinion of their Lordships, the appellant was entitled to maintain, as regards any one of such tests, that there were such special reasons as would justify a departure from the practice of the Board. Perhaps the most striking of these tests was whether the Second Kumar in fact died at Darjeeling or survived. If he did die there, that fact would completely negative the plaintiff's case. The seventh proposition above stated is applicable to the circumstances of the present case. With these preliminary observations, their Lordships will proceed to consider the contentions submitted by Mr. Page on behalf of the appellant. A number of these contentions related to subordinate matters of evidence, or that the trial Judge had not sufficiently taken into account particular oral or documentary evidence, or that the Judges who formed the majority in the High Court had not formed their own conclusions on the evidence. These subordinate matters of evidence, even if they might be called important, do not afford any sufficient reason for departure in this case from the practice as above explained by their Lordships, and their Lordships are clearly of opinion that the criticisms of the trial Judge and the Judges of the High Court are quite unjustified. Further, their Lordships are unable to find any defect in these judgments in considering the separate compartments into which the evidence conveniently falls, and carefully considering the inter-relation of such compartments and their re-action on each other. There remain three contentions with which their Lordships find it necessary to deal.

The first of these contentions relates to the admissibility of the evidence of four witnesses, conveniently referred to as the Maitra group, whom the learned trial Judge accepted as unimpeachable witnesses, and whose evidence he accepted as virtually conclusive proof of the time of "death" as having taken place at dusk, between seven and eight o'clock. The time of death or apparent death at Darjeeling is crucial. If the death took place shortly before midnight, and not at dusk, that fact would be fatal to the plaintiff's case. The learned Judges of the majority in the High Court placed the same reliance on this evidence. The evidence of these four witnesses is described with sufficient accuracy by the trial Judge as follows :—

"The evidence of these gentlemen is that one day they were seated in the common room of the (Lewis Jubilee) Sanitarium before dinner—that would be about 8 P.M.—chatting, each does not recollect all the rest, but each recollects the day, and the fact they used to be in the common room before dinner. They recollect the day, not the date or anything, but the day when a certain thing happened. When they were so seated, and there were others too, a man came with the news that the Kumar of Bhowal was just dead, and he made a request for men to help to carry the body for cremation. Principal Maitra has a distinct recollection of this request—the news broke in upon the talk they were having, and the thing has stuck in his memory."

It should be added that the man who so came into the common room has not been identified, and is not a witness. It was, further, agreed that, according to the Hindu custom, cremation would, when possible, follow immediately after the death.

Their Lordships are of opinion that the statement and request made by this man was a fact within the meaning of sections 3 and 59 of the Indian Evidence Act of 1872, and that it is proved by the direct evidence of witnesses who heard it, within the meaning of section 60 ; but it was not a relevant fact unless the learned

Judge was entitled to make it a relevant fact by a presumption under the terms of section 114. As regards the statement that the Kumar had just died, such a statement by itself would not justify any such presumption, as it might rest on mere rumour, but, in the opinion of their Lordships, the learned Judge was entitled to hold, in relation to the fact of the request for help to carry the body for cremation, that it was likely that the request was authorised by those in charge at "Step Aside," having regard to "the common course of natural events, human conduct and public and private business," and therefore to presume the existence of such authority. Having made such presumption, the fact of such an authorised request thereby became a relevant fact, and the evidence of the Maitra group became admissible. Accordingly, this contention fails.

The remaining two contentions relate to the question of identity, the colour of the eyes and the indications of syphilis.

It is agreed that the eyes of the Second Kumar and the plaintiff are Kata eyes, that is, of a shade lighter than the normal dark brown eyes of a Bengalee ; it is also common ground that the eyes of the plaintiff are of a light brownish colour. The dispute is as to the colour of the eyes of the Second Kumar. Mr. Page's contention rested upon the view that the entry of their colour as "grey" in Dr. Caddy's report to the Insurance Company in 1905 in connection with the proposal of the Second Kumar for life insurance could only mean that they were grey as distinguished from brown, and that the report must be accepted as conclusive of the matter. But this contention must fail, for not only was there conflicting evidence on the point, having regard to the statement in the affidavit dated the 6th March, 1910, given to the Insurance Company by Kali Prasanna Vidyasagar, who had long been familiar with the Second Kumar and therein stated that the latter's eyes were rather brownish, but the witness Girish Chandra Sen stated that Dr. Caddy had asked him to look for any identification marks, and that he told the doctor "grey eyes," thereby meaning kata eyes. It follows that it was a question of value of evidence, and the learned judge had before him evidence on which he was entitled to hold that the eyes of the Second Kumar were brownish, and therefore similar to the eyes of the plaintiff.

It is common ground that, when the Second Kumar went to Darjeeling, he had gummatous ulcers on both arms about the elbows, and about both legs representing the tertiary stage of syphilis, which he had contracted on some date subsequent to Dr. Caddy's examination of him in 1905. Further it is not disputed that there was evidence on which the learned Judge was entitled to find that the plaintiff is "an old syphilitic individual." It is enough to say that the plaintiff has one scar on the left arm and two on the right arm, in each case about the elbow ; these clearly, on the evidence, are a small proportior of the number of ulcers from which the Second Kumar was suffering in 1909, but there was evidence on which the learned Judge was entitled to hold that these three scars were the remains of some of the Second Kumar's ulcers. There was no definite evidence as to the permanency, or otherwise, of scars left by gummatous ulcers. There does not seem to have been any evidence which would enable the learned Judge to identify any scars on the legs of the plaintiff as corresponding in position with the position of the Second Kumar's ulcers on his legs. Mr. Page sought to found on a passage in the evidence of the plaintiff's witness, Dr. K. K. Chatterji, in which he says :

"If the ulcers of 1909, big ulcers on both arms and legs, are not treated or dressed or washed, I would give three months to him. He would get septic and die. Even if he is washed with water, but not anti-septic, it will make no difference. If washed with anti-septics but no dressing or treatment, his chance of life would increase 5 per cent. roughly speaking. If washed, but not with anti-septic and covered up with cloth and not surgical dressing, the chance would be less."

The plaintiff stated in his evidence that while with the *Sanyasis*, he had no treatment. But the doctor's evidence is a calculation of chances of recovery, which no doctor

would maintain to be without exception, and it is not surprising that he later states that there is no normality in syphilis. The whole matter is one of the value of evidence, and this contention also fails.

Accordingly, their Lordships are of opinion that the appellant has failed to establish any valid ground for departure from the practice of the Board.

Finally, the appellant rests on Article 144 and section 28 of the Indian Limitation Act of 1908. On the supposed death of the Second Kumar, the appellant entered on her widow's estate in the undivided one-third share of the Bhowal estate, which belonged to her husband and she thereafter enjoyed it—after 1911, through the Court of Wards—for a period much exceeding the necessary twelve years, and the question is whether her possession was adverse to her husband, he being in fact alive. Possession must be adverse to a living person, and, as she was possessing under a mistake as to his death, it is difficult to see how she can claim that by her possession she was asserting a right adverse to one whom she regarded as dead. The position of a widow as regards limitation is stated in *Lajwanti* v. *Safa Chand*[1], where Lord Dunedin, delivering the judgment, said :

> "It was then argued that the widows could only possess for themselves ; that the last widow Devi would then acquire a personal title ; and that the respondents and not the plaintiffs were the heirs of Devi. This is quite to misunderstand the nature of the widow's possession. The Hindu widow, as often pointed out, is not a life renter but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate. If possessing as a widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as stridhan, but she makes them good to her husband's estate."

Mr. Page, for the appellant, conceded that the appellant's possession could not be adverse to the reversioners, who would take as heirs of her husband, on the termination of her widow's estate. All that the appellant claimed to have prescribed was her interest in the estate as widow of the Second Kumar. It might well be argued that, according to the Hindu Law, the wife is half of the husband, and that, on his death, she holds his estate as one-half of the husband, but their Lordships prefer to base their rejection of the appellant's contention on the broader ground that her possession was not adverse to a husband, whom she regarded as dead.

Their Lordships cannot part with this case without expressing their deep indebtedness to counsel for their valuable assistance in a case of such unusual magnitude and complication, and, in particular, their gratitude and admiration for the untiring skill and breadth of mind with which Mr. Page has conducted his case.

Their Lordships, accordingly, are of opinion that the appeal fails and should be dismissed, and that the decision of the High Court should be affirmed, and they will so advise His Majesty. In the very special circumstances of this case, there will be no order as to costs of the appeal.

Solicitors for Appellant : *Sanderson Lee & Co.*

Solicitors for Respondents : *T. L. Wilson & Co.*

V.S. *Appeal dismissed.*

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1. (1924) 47 M.L.J. 935 : L.R. 51 I.A. 171 at 176 : I.L.R. 5 Lah. 192 (P.C.).

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Nagpur.)

PRESENT :—LORD SIMONDS, MR. M. R. JAYAKAR AND SIR JOHN BEAUMONT.

Munnalal, minor, and others .. *Appellants**

v.

Mst. Kashibai and others .. *Respondents.*

Dr. Raghunathsingh *alias* Nagulal .. *Appellant*

v.

Mst. Kashibai and others .. *Respondents.*

Evidence Act (I of 1872), sections 90 and 114—Presumption under section 90—If can be extended to the testamentary capacity of the testator—Limitation Act (IX of 1908), Article 144—Possession under claim of title—Entry in revenue records as occupier—Possession of claimant and her successors adverse to plaintiff for over forty years—Plaintiff's suit within twelve years of the original claimant's death—If in time.

Where a will was more than thirty years old and was produced from proper custody, on a question whether the presumption under section 90 of the Evidence Act extended to the testamentary capacity of the testator in addition to its actual execution and attestation,

Held, that a party setting up a will is required to prove that the testator was of sound disposing state of mind when he made his will but, in the absence of any evidence as to the state of the testator's mind, proof that he had executed a will rational in character in the presence of witnesses must lead to a presumption that he was of sound mind, and understood what he was about. This presumption can be justified under the express provisions of section 90 of the Evidence Act since a will cannot be said to be "duly" executed by a person who was not competent to execute it; and the presumption can be fortified under the more general provisions of section 114 of the Act, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about.

Though it is a general principle that a Court will always attribute possession to a lawful title where that is possible, there is no room for drawing any such presumption in a case where the circumstances under which the adverse possession was assumed are known. A lady on the death of her father in 1890 took possession of the property under a claim of title derived under her father's will and though she failed to satisfy the Revenue authorities as to her title, the fact that she was in possession was accepted by them and her name was entered as occupier. There was nothing to show that she ever withdrew her claim to title under the will of her father. She died in 1919 and after that the names of her daughters were entered in the revenue records. The plaintiff filed a suit on 28th October, 1931, twelve years all but a day after the death of the lady and claimed that the lady as the heir of her father was entitled to possession of the property under the maintenance grant to him and that her right ceased on her death in 1919, and thereafter, her daughters were in wrongful possession for a period of one day less than twelve years.

Held, that the essential fact was that the lady and her successors had remained in possession for some forty years prior to the institution of the suit and that they took possession under a claim of right adverse to the title of the plaintiff. In those circumstances the claim of the plaintiff was barred under Article 144 of the Limitation Act.

J. M. Pringle, K.C. and *R. Parikh* for Appellants.

C. S. Rewcastle, K.C., S. P. Khambatta, K.C. and *J. M. R. Jayakar* for Respondents 3 and 4 in the First Appeal.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is a consolidated appeal by special leave from two judgments and two decrees dated the 16th December, 1937, and 22nd December, 1937, respectively of the High Court of Judicature at Nagpur, which reversed two judgments and two decrees dated the 21st June, 1934, and the 15th June, 1934, respectively of the Court of the Subordinate Judge, First Class, Khandwa.

The two appeals which are consolidated arise out of two suits in ejectment. The suit to which the first appeal relates was brought by the appellants, or their predecessors in title, claiming possession of a house and certain land in a town and the house thereon. In the suit to which the second appeal relates the appellant claimed possession of three *muafi* fields. The Subordinate Judge decreed both suits but, on appeal, the High Court dismissed them.

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* P.C. Appeal No. 13 of 1945. 29th July, 1946.

The title of the plaintiffs in both suits is traced from one Balwant Singh, who died in the year 1907. The respondents claim through one Bahadur Singh, the younger brother of the father of Balwant Singh. In the first appeal, it is not disputed that Bahadur Singh was the owner of the property in suit and had power to dispose of it by will, the only question being whether he effectively did so.

Bahadur Singh died on the 13th April, 1890, having made a will dated 30th March, 1890, under which he bequeathed his property to his daughter Jankibai, and her minor son, Narain. He left no son or descendant of a son.

The learned Subordinate Judge held that the burden rested upon respondents 1 and 2, who were the daughters of Jankibai (the other respondents claiming through them) to prove the will of Bahadur, and that, whilst he could presume under section 90 of the Evidence Act that the will had been properly executed and attested, he could not, under that section, presume that the testator when he made his will, was of sound disposing mind. He accordingly held the will not proved. In appeal the High Court held that the presumption which could be drawn under section 90 extended to testamentary capacity and held the will proved.

Section 90 of the Evidence Act is in the following terms :

"Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested."

The terms of section 114 must also be noted :

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

The will of Bahadur was more than thirty years old and was produced from proper custody, and both the lower Courts rightly held that the actual execution and attestation of the will could be presumed under section 90 ; they differed on the question whether the presumption extended to the testamentary capacity of the testator. A party setting up a will is required to prove that the testator was of sound disposing mind when he made his will but, in the absence of any evidence as to the state of the testator's mind, proof that he had executed a will rational in character in the presence of witnesses must lead to a presumption that he was of sound mind, and understood what he was about. This presumption can be justified under the express provisions of section 90, since a will cannot be said to be "duly" executed by a person who was not competent to execute it ; and the presumption can be fortified under the more general provisions of section 114, since it is likely that a man who performs a solemn and rational act in the presence of witnesses is sane and understands what he is about. There was no evidence whatever that Bahadur was not in a perfectly normal state. Their Lordships feel no doubt that on this point the decision of the High Court was right, and that the will must be presumed to have been duly executed. The view taken by the learned Subordinate Judge would render it impossible, in most cases, to prove ancient wills. This disposes of the first appeal.

The second appeal stands on a different footing because it was the plaintiff's case that Bahadur had no interest in the property in suit which could be disposed of by his will. The High Court do not seem to have appreciated the nature of the second suit. Their judgment is contained in the following single sentence :

"Counsel for respondents admitting that, in view of the findings in First Appeal No. 128 of 1934 (being an appeal in a suit the evidence and findings in which do by agreement control this connected case) his suit is barred by time, the appeal succeeds and the suit will be dismissed with half costs throughout."

This admission of counsel presupposes that the High Court considered that the property in suit passed under the will of Bahadur once such will was held to be proved ; but the right of Bahadur to dispose of the property in suit had been elaborately discussed in the judgment of the Subordinate Judge, who held that Bahadur

had no interest in the property which he could dispose of by will. Neither his reasons nor the documents on which he relied, are noticed by the High Court. The respondents have not appeared on this appeal, and their Lordships find themselves in the unfortunate position of having to decide the appeal, in which the record is very heavy, not only without the assistance of any argument on behalf of the respondents, but also without the advantage of knowing what view the High Court took of the evidence in the case.

The appellant in the second appeal, as already mentioned, claims under Balwant and the learned Subordinate Judge held his title to be proved, and their Lordships accept this finding. It appears that Balwant formerly held the office of Kanungo in the District of Nimar, and also that, in or about the year 1864, a settlement was made by the British Government with the zamindars of the district under which this and other hereditary offices were abolished, and compensation was granted to the holders. On the 18th December, 1865, Balwant was given a sanad (Ex. P-28) by which he was granted certain lands with full power of alienation, subject to the payment to Government annually of Rs. 59 as quit-rent. It is admitted that this grant included the three fields, the subject-matter of the second suit. The father of Bahadur, and after his death, Bahadur, who represented the younger branch of the family, undoubtedly had some interest in the property in suit, and the difficulty is to determine the nature of that interest, there having been, apparently, no written grant. On the occasion of this zamindari settlement, Captain H. Mackenzie made a report to Government, which is extensively quoted in the judgment of the learned Subordinate Judge. The report included tabular statements giving the names of the parties to whom grants had been made, and Captain Mackenzie pointed out that, in some cases, not only heads of families with whom the settlement had been made, but junior members of the family, received grants as co-sharers. In para. 43 of this report, which is quoted in para. 11 of the judgment of the learned Judge, Captain Mackenzie pointed out that a distinction had been drawn between those who were really shareholders and those who were in receipt of a maintenance from shareholders as near relations having claims upon them, and that

> "these receipts of maintenance, of course, lapse and require renewal and generally modification at the death of each recipient. Their assignment depends either upon the will of the shareholder or perhaps upon the judgment of a Civil Court; and it is, therefore, not necessary to show them in the statement."

The name of Bahadur does not appear in the tabular statements, and from this the learned Subordinate Judge concluded that he was entitled to nothing more than a maintenance grant.

It appears that in the year 1877 Bahadur applied to the Revenue Authority to be entered as proprietor of one of the fields in suit in place of Balwant (Ex. P-5) but was told to file a suit in the Civil Court, which he did not do.

In 1890, on the death of Bahadur, his daughter Jankibai made an application to the Revenue Authorities which is Ex. P-2 claiming that the land in question had been in the possession of her father, Bahadur, and that he had executed a will in her favour under which she was in possession, and praying that her name, and that of her son, might be substituted in the records for that of Bahadur. To that application Balwant put in an answer which is Ex. P-4 in which he stated that the land in question pertained to "jamindari rights" and the "sanad" thereof was in his name and that, under such circumstances, and according to the family custom of the jamindars, Bahadur dying without any male issue, the application of Jankibai for mutation in her name should be rejected. It is clear that Balwant's case was that the right of maintenance possessed by Bahadur did not pass to Jankibai. The Revenue Authorities considered the matter and on the 2nd May, 1891, the Deputy Commissioner passed an order rejecting Jankibai's application. The order contained this sentence:

> "It is no doubt satisfactorily established that at a family arrangement Bahadur Singh was in or prior to 1860 granted certain fields to be held by him and his heirs as a maintenance."

The appellant relies on this statement as showing that Jankibai was entitled to succeed as her father's heir so that her possession was lawful during her lifetime but, as already pointed out, this was not Balwant's case. In appeal from the order of the Deputy Commissioner, the Commissioner by an order dated 1st June, 1891, agreed with the view of the Deputy Commissioner that Jankibai was not entitled to be entered as proprietor on the *muafi* register, but acceded to Jankibai's request that she should be entered as occupier in the *jamabandis* in lieu of Bahadur.

In pursuance of the order of the Commissioner, the name of Narain was entered as occupier until his death which occurred in 1903, and thereafter the name of Jankibai was entered until her death in 1919, and after that the names of her daughters were entered. It is not necessary to refer in detail to the *jamabandis*; they all show Balwant (or his successors) as proprietor. In the record for the year 1917/18 which is the last record before the death of Jankibai, she was shown as the occupier at an occupancy rent of Rs. 89. This rent is evidently part of the assessment made by Government; there is no suggestion that any rent was ever paid to Balwant or his successors which could be relied on as evidence of the relationship of landlord and tenant.

This suit was filed on the 28th October, 1931, twelve years all but a day after the death of Jankibai. The case of the plaintiff was that on the death of Bahadur Jankibai, as his heir was entitled to possession under the maintenance grant to him, that her right ceased on her death, and thereafter the respondents who were not the heirs of Bahadur were in wrongful possession for a period of one day less than twelve years. The appellant relies mainly on the *jamabandis* (which are *prima facie* evidence of the truth of their contents under section 80 of the Central Provinces Land Revenue Code) as showing that he and his predecessors were the proprietors and that Jankibai was only an occupier. But the *jamabandis* do not show the character in which Jankibai was occupying. The appellant relies on the general principle that a Court will always attribute possession to a lawful title where that is possible. But the only title which would account for the possession from 1890 down to the date of suit is that claimed by the respondents, namely, that Jankibai became absolute owner of the property under the will of her father; on the appellant's case possession was admittedly wrongful after the death of Jankibai.

Their Lordships, however, think that there is no room for drawing any presumption in this case since the circumstances under which the possession was assumed are known. Jankibai, on the death of her father, took possession under a claim of title derived under her father's will. She failed to satisfy the Revenue Authorities as to her title, but they accepted the fact that she was in possession and entered her name as occupier. There is nothing to show that she ever withdrew her claim to title under the will of Bahadur and that claim was plainly adverse to the title of Balwant. If, after the death of Bahadur, the rights of the parties had been determined in a civil suit, it might have been held that Bahadur possessed an interest, whether as co-sharer or occupancy tenant, which he could dispose of by will; or it might have been held, as the appellant contends that it would have been, that Jankibai succeeded as heir to her father for the limited interest of a female; but as Bahadur's interest was not the subject of any written grant, it is obvious that Jankibai might have failed to prove that she had inherited any interest in the property, in which case her possession would have been unlawful from its inception. It is useless to speculate on what might have been the result of litigation which neither party ventured to embark upon. The essential fact is that Jankibai and her successors remained in possession of the property for some 40 years prior to the institution of the suit and that they took possession under a claim of right adverse to the title of the appellant. In their Lordships' opinion, in these circumstances, the claim in the second suit is barred under section 144 of the Limitation Act. Their Lordships have not forgotten that at the trial the plaintiff called two witnesses who asserted that Balwant, on grounds of compassion, had authorised Jankibai to remain in possession. This evidence, which seems inconsistent with the plaintiff's case that Jankibai was entitled to succeed as heir of her father, was accepted

by the learned Subordinate Judge but rejected by the High Court in their judgment in the first appeal. Their Lordships are not prepared to accept this testimony of the grant of a verbal licence to explain 40 years' possession.

For these reasons, their Lordships will humbly advise His Majesty that both appeals be dismissed. The only respondents who have appeared are Babu Rajaram and Gyanchand, respondents 3 and 4 in the first appeal, and the appellants must pay their costs.

Solicitors for Appellants : *T. L. Wilson & Co.*

Solicitors for Respondents 3 and 4 in the first appeal : *Hy. S. L. Polak & Co.*

H.J.U./V.S. *Appeals dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD MACMILLAN, LORD SIMONDS, LORD DU PARCQ, MR. M. R. JAYAKAR AND SIR MADHAVAN NAIR.

Ramdhandas Jhajharia .. *Appellant**

v.

Ramkisondas Dalmia and others .. *Respondents.*

Evidence—Documents to speak for themselves when oral testimony is unreliable—Transaction whether mortgage or sale—Form not to be preferred to substance—Court must find the substance behind the form.

Where in a case oral testimony is of an unreliable and untrustworthy character, the safest policy would be to let the documents speak for themselves. This does not mean that, when the question is whether a transaction is a sale or mortgage, form is to be preferred to substance. It is an inviolable rule that upon such a question the Court must find the substance behind the form. But where the oral evidence is unreliable and contradictory, the Court cannot safely depart from the written evidence of the documents.

Sir Herbert Cunliffe, K.C., W. W. K. Page, K.C. and *T. B. W. Ramsay* for Appellant.

J. M. Pringle, K.C. and *S. Hyam* for Respondent No. 1.

Sir Thomas Strangman, K.C., S. P. Khambatta, K.C. and *B. Sen* for Respondents Nos. 2 to 7.

Their Lordships' Judgment was delivered by

LORD SIMONDS.—In this appeal, which is brought from a judgment and decree of the High Court of Judicature at Bombay in its Appellate Jurisdiction dated the 8th October, 1942, reversing two judgments and a decree of that Court in its Ordinary Civil Jurisdiction, their Lordships are confronted with an unfortunate difference of opinion upon what appears to be a pure question of fact. The Appeal Court (Beaumont, C.J. and Chagla, J.) reluctantly and with a full appreciation of the weight to be attached to the decision of the Trial Judge (Kania, J.), who had seen and heard the witnesses, felt constrained to take a different view of the facts from that which he had taken, and their Lordships are clearly of opinion that they were right in doing so.

The substantial question can be shortly stated. The joint Hindu family, of which the appellant is the *karta*, carried on certain family businesses, including an agency firm in the name of Jhajharia Dhandhania and Company, which had, until February, 1939, acted as selling agents for the Sholapur Spinning and Weaving Company, Limited, which will be called "the Company," and in the month of June they owned 163 shares of Rs. 1,000 in this Company which stood as to 56 in the name of the appellant, as to 106 in the name of his son Nandkishore and as to the remaining one in the name of another nominee.

At the same date these shares were pledged as to 104 with the Allahabad Bank, Limited, Calcutta, and as to 59 with the Punjab National Bank, Limited, Calcutta, to secure certain overdrafts. But the Company claimed a lien upon them in respect

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* P. C. Appeal No. 11 of 1945. 30th July, 1946.

of a large sum alleged to be due from the agency firm. On the other hand, the firm had a large claim against the Company in respect, as they alleged, of an unlawful termination of the selling agency.

On the 9th March, 1939, the Company resolved to exercise their lien and notice of this resolution was duly given to the agency firm.

At about the same time the pledgee Banks were pressing for payment of the overdrafts. From other quarters also the appellant's family were being harassed. It is beyond doubt that they were in grave financial embarrassment.

The business of the Company was at all material times managed by a firm of managing agents known as Ramkumar Morarka, the second respondents to this appeal, of which the principal partner was Ramkumar Shrinivas, sometimes called Ramkumar Morarka, the third respondent, who was also a director of the Company. It appears to be common ground that this Ramkumar Morarka was on unfriendly terms with the appellant.

It is unnecessary to rehearse the events of April and May 1939, during which the appellant's family were in ever-increasing difficulties. At the end of May, the first respondent Ramkissondas Dalmia appeared upon the scene. He was a man of wealth and position, thought to be favourably disposed to the appellant, and it was hoped that by his intervention the family fortunes might be retrieved. He had shortly before through a nominee acquired the managing agency of some sugar mills in which the appellant's family were interested.

It is at this point that the question of fact arises. The 163 shares of the Company owned by the appellant's family were in June, 1939, disposed of (a neutral word will in the first place be used) by the Banks to the first respondent. The appellant alleges that they were mortgaged to the first respondent and sub-mortgaged by him to the second respondent. The respondents other than the first respondent claim that they were sold to the first respondent and that then 100 of them were sold by him to the second respondent and that the remaining 63 were first pledged and subsequently sold to the second respondent.

Upon this apparently simple question oral evidence voluminous and bewildering has been given and their Lordships find themselves in agreement with Chagla, J., who, in the Appeal Court, said :

"In a case where oral testimony is of such an unreliable and untrustworthy character, the safest policy would be to let the documents speak for themselves."

This does not mean that, when the question is whether a transaction is a sale or a mortgage, form is to be preferred to substance. It is an inviolable rule that upon such a question the Court must find the substance behind the form. But where the oral evidence is unreliable and contradictory, the Court cannot safely depart from the written evidence of the documents.

It is, then, of first importance to see from the documents what the Banks did with the shares of which they held the certificates together with blank transfers. They were concerned to realise the shares to the best advantage. They knew that so long as the Company claimed a lien upon them, they were not easily marketable and that, though negotiations were afoot for the release of the lien, the position was uncertain. The evidence of the documents is overwhelming that they did just what it is inherently probable they would do ; they disposed of the shares by way of sale to the first respondent. Their Lordships think it unnecessary to repeat the careful analysis of the transaction by the Banks which appears in the judgment of the Appeal Court. From the books of the Banks, from the formal documents and above all from the correspondence between the Banks and the appellant one thing emerges clear beyond all doubt, *viz*., that the Banks acted on the footing that they were selling the shares to the first respondent and crediting the appellant with the net proceeds of sale. It appears to their Lordships that the learned trial Judge in his careful and elaborate judgment did not give sufficient weight to this aspect of the case.

Nor has the appellant offered any satisfactory explanation of another matter which appears to be of decisive importance. The formal transaction in respect

of the shares took place on the 10th June, 1939. But on the 5th June, a petition had been presented to adjudicate the appellant insolvent and on the 6th June, he had through his attorneys given an undertaking to the Court that he would not alienate, encumber or dispose of any of his assets. It follows that on the 10th June, no one but the Banks, who were unaffected by the undertaking, could deal with or give any title to the shares in question and there appears to be no justification whatever for supposing that they, under the colour of documents which exhibited a sale and nothing else were joining with the appellant in carrying out a quite different transaction.

This is sufficient to conclude the case against the appellant, for if the Banks sold the shares to the first respondent as they lawfully might, the appellant at least could not maintain his suit for redemption whatever might have been the subsequent transactions between the first respondent and other parties. But their Lordships think it proper to refer to one other matter.

It has been stated that the appellant's account of the transaction was that the shares were not sold but mortgaged to the first respondent and by him, sub-mortgaged to the second respondent. This was the story baldly set out in the original plaint, and a more unlikely story in view of the relations between the parties it would be difficult to imagine. This seems to have occurred to the appellant and at a later stage he endeavoured to give it the appearance of greater credibility by alleging that, while all the 163 shares were to be mortgaged and sub-mortgaged as stated, yet in regard to 100 of them if the third respondent succeeded in getting the Company to pay a sum of Rs. 3,00,000 in satisfaction of the appellant's claim for the unlawful determination of the selling agency, then the third respondent should become the purchaser of such shares at Rs. 2,000 per share. This was put forward as the reason why the third respondent was induced to entertain a proposal which otherwise appears to have offered him no advantage. To their Lordships as to the learned Judges of the Appeal Court this amended story is wholly unacceptable, and without discussing it in further detail, they will be content to adopt and repeat what was said by Beaumont, C.J.:

> "It seems to me quite impossible to accept on behalf of the plaintiff a story, inconsistent with his plaint, set up by witnesses who had failed to mention the matter on two previous occasions when it would have been relevant to do so, which is not supported by any shred of documentary evidence, which is contradicted by the documents of the other side and which is inherently most improbable."

In this view Chagla, J., concurred. Their Lordships consider that this is the right conclusion to be drawn from all the evidence in the case and that the appeal should be dismissed with costs to respondents Nos. 2 to 7. They will humbly advise His Majesty accordingly.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondent No. 1: *Barrow, Rogers & Nevill.*

Solicitors for Respondents Nos. 2 to 7: *Hy. S. L. Polak & Co.*

H.J.U./V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BELL.

K. Kalianna Gounder .. *Petitioner**

v.

Balasubramaniam (minor) and others .. *Respondents.*

Court-Fees Act (VII of 1870 as amended in Madras), section 7 (iv-A) and (v)—Applicability—Hindu joint family—Suit by minor sons for declaration that sale by father was not binding on them, for partition and possession—Value for purposes of court-fees and jurisdiction.

The suit was filed by three minor sons of a Hindu represented by their mother as next friend and they sought a declaration that a sale deed executed by their father for himself and as the

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* C. R. P. No. 112 of 1946. 25th October, 1946.

guardian of two of them was not binding on them inasmuch as it was not executed for family necessity, for partition and for recovery of the properties. On a question as to whether section 7 (*iv-A*) or 7 (*v*) of the Court-Fees Act applied to the case,

Held, that in the circumstances the plaintiffs were in effect seeking for partition of the joint family properties and for possession ignoring the alienation, and that the value of the suit for purposes of court-fees and jurisdiction should be determined under section 7 (*v*) of the Court-Fees Act.

Ramaswami v. *Rangachariar*, (1940) 1 M.L.J. 32 : I.L.R. 1940 Mad. 259 (F.B.), considered.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree of the District Court, Salem, dated 10th December, 1945 and passed in C. M. A. No. 27 of 1945 (O.S. No. 226 of 1944, District Munsiff Court, Namakkal).

R. Desikan for Petitioner.

A. Srirangachariar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner is defendant 1 in O. S. No. 226 of 1944 filed by three sons of their next friend, their mother, (*a*) for a declaration that a sale deed executed by their father for himself and as guardian of the first and second plaintiffs was not binding on them, not having been executed for family necessities, (*b*) for partition and (*c*) for recovery of the properties.

The suit was filed in the Sub-Court, Salem, but was returned by the Subordinate Judge, apparently after consideration for presentation to the District Munsiff's Court of Namakkal on the ground that it was, in essence, a suit for possession and was within the jurisdiction of the latter Court. It was duly presented in the Court of the District Munsiff, Namakkal; but again, the plaintiffs met with a check, because, on the preliminary consideration of an issue relating to jurisdiction, the District Munsiff rejected the reasoning of the Sub-Court and held that the suit was, in substance, one for declaration and that therefore section 7 (*iv-A*) of the Court-Fees Act applied. In the result, he held that having regard to the value of the property, it was beyond the jurisdiction of the Munsiff's Court. This was on 20th February, 1945. The matter then came before the District Judge of Salem; and on 10th December, 1945, he set aside the order of the District Munsiff and ordered that the plaint should be entertained and disposed of in the District Munsiff's Court. The matter comes up in revision from the decision of the District Judge.

The learned District Judge considered that the matter was one that had been fully and properly dealt with by the Sub-Court and held that it was not open to the Court-fee examiner or any one else to raise the subject of jurisdiction in the Court of the District Munsiff who should not have returned the plaint again for re-presentation to the Sub-Court. The learned District Judge went on to say that in his view the plaintiffs were seeking, in effect, for partition of the joint family properties and for possession of lands and gardens which had been alienated by their father during their minority. He held, therefore, that they were entitled to ignore the alienation and claim possession of the shares due to them. In such a case, he said, a suit would be one which fell within the ambit of section 7 (*v*) of the Court-Fees Act. This was the section under which the court-fees had originally been paid in the Sub-Court. With the assistance of the learned counsel I have been taken through many cases dealing with this vexed question. I have come to the conclusion that there is sufficient support to be found in the cases cited to me by the respondent to justify me in refusing to interfere with the decision of the District Judge.

It is said on behalf of the petitioner here that the suit is not in form one for partition. The father, for example, is not made a party and none of the usual details such as provision for the payment of the family debts, division of the properties by metes and bounds and so on, have been set out. It is also contended that inasmuch as the deed which is mentioned in the plaint and a declaration as to which is asked for, was executed by the father for himself and as guardian of two at least of the plaintiffs, strictly they must ask for a declaration that the deed

should be set aside before they can hope to get possession. In effect, the petitioner says that this is much more of a suit to set aside a deed than it is one for partition and that the reasoning therefore of the District Judge as quoted is not applicable to the facts of this case. On the other hand, it has been argued and I think with some force that an analysis of the various decisions cited to me shows that the general opinion is that wherever members of a Hindu family are seeking to regain their family property or their shares therein, the property having passed into other hands, then, despite inadequacies or over-amplifications in the pleadings, nevertheless, the suit is, in essence, one for possession and should be dealt with under section 7 (v). No case exactly on all fours has been cited to me ; but the Full Bench decision in *Ramaswami* v. *Rangachariar*[1] appears generally to support the proposition that members of a Hindu family out of possession may ignore a voidable deed and seek to regain possession. That case points out at page 280 that even if a plaint contains a prayer for a declaration or cancellation, there may yet be good reasons for holding it to be one for a purely incidental, but unnecessary relief ; and approval is given to the proposition now put forward by the respondent and accepted by the District Judge of Salem that even where there is a deed executed without authority, or, where authority exists, nevertheless, the circumstance justifying the use of the authority did not exist, it is not necessary for persons who are not bound by it, to sue to set it aside, for it cannot be used against them. In my opinion, the asking for a declaration in this case comes within the general sense of that authority and taking all the circumstances into consideration, the suit is, in effect, one for possession to which section 7 (v) applies. This civil revision petition is, therefore, dismissed with costs.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

The Public Prosecutor .. *Appellant**

v.

D. Khader Khan .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), section 15 (b)—Offence under—Burden of proof—Essentials of offence—Denial of liability to pay tax—Whether good defence.

In a prosecution for an offence under section 15 (*b*) of the Madras General Sales Tax Act, the burden is upon the prosecution to establish affirmatively that the accused was liable to pay the tax and that he failed to pay the same. Where the accused disputes his liability to pay the tax, the prosecution should prove affirmatively that he was liable to pay the tax claimed and when it has not proved it satisfactorily, the Magistrate will be justified in acquitting the accused.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Joint Magistrate of Madanapallee in C.C. No. 86 of 1945 on his file.

The appellant in person.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This is an appeal by the Crown against the order of the Joint Magistrate of Madanapalle, acquitting the accused in C. C. No. 86 of 1945, who was prosecuted for failure to pay the general sales tax for 1943-44 and 1944-45 in contravention of rule 10 of the General Sales Tax Rules. The offence was punishable under section 15 (*b*) of the Madras General Sales Tax Act, 1939.

There is no other evidence except that of the Assistant Commercial Tax Officer to show that the accused was liable to pay the tax. Because he did not appeal against the levying of the tax, the prosecution wanted it to be inferred that the

1. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).

* Criminal Appeal No. 853 of 1945. 8th February, 1946.

tax was leviable and that he was liable to pay the tax. As pointed out in *Ramaswami Iyengar* v. *The Sivakasi Municipality*[1], in which reference is also made to other cases decided by this Court, the burden is upon the prosecution to establish affirmatively that the accused was liable to pay the tax and that he failed to pay the same. It is admitted that he failed to pay it, but he disputes his liability to pay it. He says that his turnover was very poor, that he did not have so much sales as it was thought he had and that therefore he was not liable to pay the tax. The prosecution must prove that the accused is liable to pay the tax claimed and it is not denied that, if that be so, the order must stand. Since I agree with the Joint Magistrate that the prosecution has to prove that the accused is liable to pay the tax claimed and that it has not proved it satisfactorily, the Magistrate was justified in acquitting the accused.

The petition is accordingly dismissed.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Mookka Pillai *alias* Sudalaimuthu Pillai .. *Appellant**

v.

Valavanda Pillai and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 8—Applicability to appeals—Practice—Amendment—Plaint in individual capacity—Amendment into one in a representative capacity—If permissible at the stage of appeal.

Hindu Law—Reversioner party to transaction by widow—Estoppel.

An amendment of a plaint can be made at any stage so long as it does not alter the nature or the character of the suit or the cause of action and there is nothing which prevents a Court from permitting persons suing in their individual capacity to sue as representatives of a larger group, even during the stage of appeal. When the appellate Court finds that an amendment of this kind which does not materially change the substance of the suit is necessary in the ends of justice, it should be allowed to overcome a technical difficulty in the way of the plaintiffs. Order 1, rule 8 of the Code of Civil Procedure applies to appeals as well as suits.

Where reversioners who were parties to a transaction by a widow also happen to be the actual reversioners on the death of the widow, it will not be open to them to urge that the transaction does not bind them. Of course, if it is a mere *spes successionis* there can be no estoppel; but if there was some antecedent title which was set up, and which might prove good or bad ultimately and it was on the basis of this antecedent title, that a compromise was effected, then the transaction ceases to be a transfer of mere *spes successionis* and the doctrine of estoppel comes into play.

Kanhai Lal v. *Brij Lal*, (1918) 35 M.L.J. 459 : L.R. 45 I.A. 118 : I.L.R. 40 All. 487 (P.C.) and *Nathu Lal* v. *Babu Ram*, (1935) 40 C.W.N. 481 : L.R. 63 I.A. 155 (P.C.), relied on.

Appeal against the decree of the District Court of Madura in A. S. No. 85 of 1944, preferred against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 84 of 1941.

V. Ramaswami Aiyar and *V. Meenakshisundaram* for Appellant.

S. Panchapakesa Sastri and *H. Rama Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant appeals from a decree granted to the plaintiffs for recovery of possession of the suit properties with mesne profits. The plaintiffs' suit was dismissed by the Subordinate Judge, but was decreed on appeal by the District Judge of Madura. Originally, the plaintiffs sued for a declaration that they and the 12th defendant were trustees of the suit properties and were entitled to recover possession from defendants 1 to 3. The claim was opposed on the basis of a will executed by one Irulayi, widow of one Sudalaimuthu Pillai under which she set apart the properties for the performance of charities and nominated certain trustees. The will provides for the filling up of vacancies in the trusteeship, and if the trustees so appointed by her or coming in their place by co-option refuse to

1. (1936) M.W.N. (Crl.) 221.

* S. A. No. 194 of 1945. 18th July, 1946.

act or do not act properly, fresh trustees were to be appointed by all the married adult male members of her community, namely, that of Arumugamangalam Vellalars living in the Madura District. The plaintiffs stated that the trustees did not act properly, that the male members of the community met together and elected them, and that they were therefore entitled to sue for the recovery of possession of properties from defendants 1 to 3, who had no right whatever. The defendants contended that the plaintiffs were not duly elected trustees, that all the trustees who were previously functioning did not refuse to act and that there was nothing to show that they acted improperly. Another point raised by them was that Irulayi had only a life interest in the properties and had no right to dispose of any of them by will. Both these contentions found favour with the learned Subordinate Judge. On appeal, however, the defect in the title set up by the plaintiffs as trustees were sought to be got over by an amendment petition in which the plaintiffs asked that they should be allowed to sue as the representatives of the community in question. The amendment though opposed was allowed and it is in this capacity as representatives of the community of Arumugamangalam Vellalars that they and the 12th defendant together got a decree at the hands of the District Judge. On the second point, the learned District Judge held that Irulayi got an absolute title to the properties in dispute under the award of the mediators who were called upon to settle the disputes that had arisen between her on the one hand and her husband's brother Gopala Pillai and his sons and others.

The reference to the arbitrators is evidenced by Ex. P-1 dated 21st September, 1906, and the award is Ex. P-2 dated 10th January, 1907. It is not disputed that under the reference the parties wanted the properties allotted to each share to be allotted absolutely and that the award does so in fact.

Mr. V. Ramaswami Ayyar, the learned advocate for the 1st defendant has disputed the correctness of the conclusion reached by the learned District Judge on both the points. He contended that the provisions of Order 1, rule 8 were to be applied only in the stage of a suit and could not be taken advantage of during the hearing of an appeal from a decree in the suit for the purpose of overcoming an obstacle in the way of the plaintiffs' title. In my opinion this contention has no force. An amendment can be made at any stage so long as it does not alter the nature or the character of the suit or the cause of action and there is nothing which prevents a Court, so far as I am able to see, from permitting persons suing in their individual capacity to sue as representatives of a larger group, even during the stage of appeal. When the appellate Court finds that an amendment of this kind which does not materially change the substance of the suit is necessary in the interests of justice, it should be allowed to overcome a technical difficulty in the way of the plaintiffs. There is no authority holding that Order 1, rule 8 applies only to suits and not to appeals.

There is no substance in the point that the plaintiffs should get the trustees removed first. Under the will they have the right to take possession of the properties in the event of mismanagement and if the trustees are not in possession having allowed third parties like defendants 1 to 3 to get into possession they can ask to be put in possession; the removal of the trustees who have already got out of the way is not a condition precedent.

On the question of Irulayi's title, the argument addressed was that as she put forward before the arbitrators a claim only as the widow of Sudalaimuthu, she could not get under the award an absolute title and that the reversioners could not confer on her any such title even if they wanted. It was also urged that there was nothing like estoppel in the case of a transfer of a *spes successionis*. The muchilika Ex. P-1 refers to the existence of prior disputes between Irulayi and Gopala Pillai and his sons. It was to settle these disputes that the intervention of the arbitrators was sought. What those disputes were is not apparent from any oral evidence in the case but can be gathered from certain previous proceedings which took place between the parties. Gopala Pillai, one of the sons of the 1st defendant filed O. S. No. 85 of 1926 impeaching this very arrangement under the award.

Irulayi filed a written statement Ex. P-8 in answer to this action and in this she stated that the dispute that she had raised was that she was entitled under the oral directions of her husband to an absolute title to the estate left by her husband. Her statement is good evidence of the right claimed by her, though it is certainly not proof of the validity or legality of that right. In 1936 the present 1st defendant himself filed a suit for setting aside the award arrangement impeaching that it was not binding against him. In this suit he tells us what were the claims that were put forward by the parties on Sudalaimuthu's death. Gopala Pillai was claiming the properties as joint family properties which he and his sons got by survivorship, while Irulayi stated that they were the self-acquisitions of her husband Sudalaimuthu. These then were the disputes that went before the arbitrators, Gopala Pillai and his branch alleging that the properties were joint family properties which passed to them on Sudalaimuthu's death by survivorship, and Irulayi pleading that they were the self-acquired properties of her husband, which she got under his oral directions and that in any event, they were not joint family properties. It was in this state of affairs that the parties met together and agreed that whatever properties were allotted to each of the disputants should be allotted absolutely to them. The mediators divided the properties between them on this basis. It is not suggested that the mediation and the award were a device or a contrivance adopted by the widow and the reversioners to divide the estate between themselves to the prejudice of the ultimate reversioners. It was a case where each party was asserting some title to the property in negation, partial or wholesale, of the title set up by the other side. There is no reason why in these circumstances the award should not be regarded as a *bona fide* compromise of disputes that had arisen between the parties as binding on both sides. According to the plaintiffs in this suit, the claim set up by Gopala Pillai and his branch that the properties were joint family properties and passed to them by survivorship was a false one; but there is nothing which prevented the arbitrators from proceeding on the basis that the claim was a true one and that Gopala Pillai and his sons were persons fully entitled to the properties who of their own accord and free-will could give a half share in them absolutely to the widow. All that is required in the decisions cited for the appellant is that the persons who enter into a compromise with the widow must be persons who could convey a title to her. Gopala Pillai claimed that he got the properties by survivorship and the arbitrators possibly recognised this claim and gave the widow a half share as Gopala Pillai and his sons wanted them to do. It is one thing for the ultimate reversioners to come forward and impeach a transaction as not binding on them, as it was a mere cloak or contrivance to cheat them of their reversionary rights, brought about by collusion and fraud between the widow on the one hand and the presumptive reversioners on the other. But it is another thing for the very reversioners who are the parties to the transaction and who happen to be the actual reversioners on the death of the widow to urge that it does not bind them. Of course, if it is a mere *spes successionis* there can be no estoppel, but if there was some antecedent title which was set up, it might prove good or bad ultimately and it was on the basis of this antecedent title that the compromise was effected, then the transaction ceases to be a transfer of mere *spes successionis* and the doctrine of estoppel comes into play.

This case is in my view governed by the Privy Council's decisions in *Kanhai Lal* v. *Brij Lal*[1] and *Nathu Lal* v. *Babu Ram*[2]. The decision of the lower appellate Court is confirmed and the second appeal is dismissed with costs.

No leave.

K.S. *Appeal dismissed.*

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1. (1918) 35 M.L.J. 459 : L.R. 45 I.A. 118 : I.L.R. 40 All. 487 (P.C.).
2. (1935) 40 C.W.N. 481 : L.R. 63 I.A. 155 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE YAHYA ALI.

L. P. Lakshmanan Chettiar and others .. *Petitioners**

v.

Thangam *alias* Palanichami Chetti and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 110—*Value of subject-matter in appeal to Privy Council—Computation—Decree of affirmance with a slight variation as to certain debts in a partition decree —Leave to appeal to Privy Council—When granted.*

The value of the subject-matter in dispute in an appeal to the Privy Council in a partition suit must be taken to be the value of the share in the joint family property in respect of which the appellant is claiming.

Bai Shevantibai v. *J.R. Warick*, (1944) 2 M.L.J. 218 : L.R. 77 I.A. 142 (P.C.), considered.

When there is a slight variation of the decree which is wholly in favour of the proposed appellant and about which he has no grievance and in regard to other matters the appellate decree has affirmed the decree of the trial Court, the appellate decree is in the main one of affirmance within the meaning of section 110 of the Civil Procedure Code and the appellant cannot have because of the modification, a right of appeal on other points on which the Courts have concurred without showing that there is a substantial question of law involved.

Case-law discussed.

If the subject-matter of the dispute in appeal had been the amount of the decree or the amount of damages, a variation whether to the prejudice or in favour of the petitioner would not alter the decree of variance into one of affirmance. But where the question in dispute is on a totally different point such as the question of debts due by the family in a partition suit in regard to which the applicant has succeeded and succeeded altogether so that he has no further grievance in the matter, he cannot without showing a substantial question of law have a right to litigate upon other points upon which the Courts have been in agreement.

Petition under sections 109 and 110 and Order 45, rules 2 and 3 of Civil Procedure Code praying the High Court for the grant of a certificate to enable the petitioners herein to appeal to His Majesty in Council against the judgment and decree of the High Court dated 22nd January, 1946, and passed in A. S. No. 410 of 1944, preferred against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 9 of 1943, dated 31st March, 1944.

V. Ramaswami Aiyar for Petitioners.

K. V. Ramachandra Aiyar, V. Meenakshisundaram, O. K. Ramalingam and *R. M. Halasyam* for Respondents.

The Judgment of the Court was delivered by

Yahya Ali, J.—This petition was filed by defendants 1 and 3 to 9 for leave to appeal to His Majesty in Council against the judgment and decree of this Court in Appeal No. 410 of 1944. It is opposed principally by the first and second respondents who were the plaintiff and the second defendant respectively. The first objection is that the case does not fulfil the requirements of section 110 of the Code of Civil Procedure as regards the amount or value of the subject-matter in dispute in the appeal. The second ground is that the decree is one of affirmance and the appeal does not involve a question of law and consequently is not a fit case for appeal to the Privy Council. The petitioners contend that the value is above the statutory minimum and that the decree is one of variance and not of affirmance.

The first and second defendants are brothers and the plaintiff is the son of the second defendant. Third and fourth defendants are the sons of the first defendant, and defendants 5 to 9 are the sons of the third defendant. Thus defendants 1 and 3 to 9 represent one branch of the family while the second defendant and the plaintiff represent the other branch. They constituted a joint Hindu family ; on the 9th February, 1932, an attempt was made at a partition and a muchilika Ex. P-1 was executed in favour of mediators ; but for some reason, which is not material to

* C. M. P. No. 3309 of 1946. 11th October, 1946.

these proceedings, the panchayat fell through. The case of defendants 1 and 3 to 9 was that in spite of this, the family reunited and continued to be joint until June 1935 and on 7th June, 1935, there was a final and complete partition which was fully acted upon. Ex. D-1 is the document which was executed on that date containing the details of the partition alleged to have been effected. The second defendant and the plaintiff attacked the genuineness of Ex. D-1 and averred that nothing in fact took place then. The trial Court found that there was a division in June 1935 as alleged by the first defendant. It also found that Ex. D-1, prepared in connection with the partition, is not a fabricated document but is in the nature of a partition list and is as such inadmissible in evidence for want of registration and since the document itself is not admissible, the details of the partition could not be proved by other evidence.

The suit properties are comprised in three schedulos attached to the plaint. A Schedule consists of two items of immoveable property valued at Rs. 8,000 and Rs. 4,000 respectively aggregating to Rs. 12,000. Schedule B consists of moveables alleged to belong to the family valued at Rs. 3,540. C Schedule property is a private religious trust consisting of certain temples dedicated to Pechiamman and certain other deities with some shops attached to the trust. The properties in Schedule C-1 are the moveable properties belonging to the idol and they go with Schedule C. C Schedule property which consists of the temple was valued in an arbitrary manner at Rs. 5,000 by the plaintiff for the reason alleged by him that as it is a temple there is no market value for it. The ornamental articles mentioned in Schedule C-1 are valued at Rs. 690.

In appeal, the general contention was raised that Ex. D-1 was admissible as evidence of the partition and that it was merely a minute or memorandum of what had already been settled or completed. It was also argued that there was part performance of the partition embodied in Ex. D-1. But the main purpose for which the admissibility of Ex. D-1 was urged was to establish the exclusive right of the first defendant and his line to the right of management of the properties mentioned in Schedules C and C-1. Under Ex. D-1 that right was given to the senior line represented by petitioners (the first defendant and his stock). It was in the alternative contended that apart from the right conferred under Ex. D-1 there was a family custom under which the right of management was indivisible and it went to the senior branch of the family. There was no contention whatever before us with regard to any of the properties mentioned in Schedules A and B. In fact, so far as B Schedule properties are concerned, the trial Court had found that barring a bureau, the first defendant was not in possession of any of the other articles mentioned in that schedule and this finding was not questioned before us.

On the question of the admissibility of Ex. D-1, this Court agreed with the conclusions of the trial Judge. After examining the provisions in Ex. D-1, and the relevant decisions this Court came to the conclusion that the parties intended Ex. D-1 to be evidence of partition and the document constituted the real bargain between the parties and hence was inadmissible in evidence for want of registration. In doing so, the well-settled principles which are deducible from the authorities bearing upon the question were applied to the case and those principles were set out in these terms:

"The principles however which have to be borne in mind in regard to this point are well established. If in fact a division takes place first and later on there is a document which is merely a record of a past event and which is dissociated from the prior division in fact and in reality, the document is not a deed of partition requiring registration. But there must be a real dissociation in fact between the partition and the document. If the document was intended to be evidence of the partition, then it would require registration. In this case the evidence adduced by the appellants makes it clear that the document and the division were all parts of the same transaction and that there was no dissociation between the one and the other."

The contention as regards part performance of the partition embodied in Ex. D-1 was negatived both on the ground that it was raised neither in the written statement nor at the trial and on the ground that according to the evidence there were no facts established in the evidence on which such a plea could be founded and this

Court concurred with the findings of the trial Court. Lastly with regard to the family custom pleaded regarding the right of management of C Schedule properties, the trial Court found against the existence of such a custom and this Court entirely agreed with that finding and held that the custom set up by the petitioners-appellants had not been proved.

These findings were sufficient to affirm the decree of the lower Court directing a division of the properties in various schedules including C and C-1 Schedules which were directed to be managed by turns. But two minor questions were raised at the end of the argument and directions were solicited with regard to them. The first question related to the maintenance of the tenth defendant (third respondent here) who is the mother of the first and second defendants. The second defendant made a claim that he had been maintaining his mother all through and that he had a right to be reimbursed. This claim although put forward at the trial was not definitely decided by the trial Court. Mr. Sitarama Rao, learned advocate for the plaintiff who was the first respondent in this Court, conceded that this claim to reimbursement may be investigated at the time of the final decree and both the question whether the second defendant is entitled to reimbursement by reason of his having maintained his mother and the question as to the amount to which he is entitled on that account were left open by this Court to be decided at the stage of the final decree. There was thus no final adjudication of the claim to reimbursement nor was there any amount decreed as payable to the second defendant by any of the respondents. The second minor question raised at the appeal was as regards the debts which the first defendant alleged were payable by the family. Except in one or two instances, the trial Court directed that there need be no provision made in the decree as regards those debts but the matter was left open to be decided in suits to be filed by the respective creditors.

The appellants before this Court rightly argued that in a suit for partition all matters concerning the liabilities of the family should be gone into and provision should be made for their discharge before the residue available for partition is arrived at. Mr. Sitarama Rao agreed to this course also and consequently an enquiry was directed by this Court to be made before the passing of the final decree as regards the truth and the binding nature of the debts which are alleged by the first defendant to be payable from out of the family properties. The direction was that after the enquiry provision should be made for the discharge of the debts that are found to be binding on all the parties. As a matter of fact this was the only modification that was made in the decree of the trial Court and with this modification the appeal was dismissed.

Turning to the two objections raised by the respondents, we are inclined to think that both of them should prevail. In the partition-suit, the plaintiff claimed one-fourth share in the joint family properties and it was conceded by him as well as by his father, the second defendant, that the first defendant was entitled to a half share. The first defendant, on the other hand, claimed on the strength of Ex. D-1 that so far as A Schedule properties were concerned, items 1-A and 1-A (i) in the A Schedule and a shop fell to his share and the second defendant got item 2 of that schedule each having to bear a portion of the family debts. He denied having been in possession of any of the moveables mentioned in B Schedule and in regard to C and C-1 Schedules he claimed an exclusive right of management. Under section 110, Civil Procedure Code, the amount or value of the subject-matter in dispute in an appeal to the Privy Council, must be ten thousand rupees or upwards and it has been held by the Judicial Committee as recently as in *Bai Shevantibai* v. *J. R. Warick*[1] that the value of the subject-matter in dispute in an appeal to the Privy Council must be taken to be the value of the share in the joint family property in respect of which the appellant is claiming. The petitioners in this case can be said to be claiming only a half share in A Schedule properties which is in dispute and the exclusive right of management of the properties in C Schedule. So far

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1. (1944) 2 M.L.J. 218 : L.R. 77 I.A. 142 (P.C.).

as the properties in Schedules B and C-1 are concerned, there was no contest whatever in the appeal in this Court. The valuation of the A Schedule properties according to the plaint being Rs. 12,000 one half share in dispute in appeal will be worth Rs. 6,000. The plaintiff has no doubt valued the C Schedule temple at Rs. 5,000; but he has stated that the temple has no market value and that for the purpose of jurisdiction he was fixing its value at Rs. 5,000. The subject-matter of the dispute in the appeal is not the temple itself but the right of management of the temple and its properties. The value of that right could have no relation to the capital cost of the property. It can only have a notional value and we feel certain that however liberally the right of management may be valued, it would never be sufficient to make up the margin that is required to bring the value up to the required level of Rs. 10,000 or upwards. We must therefore find that the requirement of section 110, Civil Procedure Code, as regards the value of the subject-matter of the appeal is not fulfilled, in this case.

This finding is sufficient to dispose of the petition. But since the other question has been argued before us at length and it is a question of considerable importance, we have gone into it and examined the various rulings cited before us. We have pointed out that the main contest in the case was with regard to C Schedule properties and the admissibility in evidence of Ex. D-1. The decree of the trial Court was affirmed *in toto* except for the slight variation made in the matter of the debts alleged to be due by the joint family. That was a contention raised by the petitioner as first defendant and the variance that was made by this Court was entirely in his favour and he has no grievance about it. In fact that is not a question which forms part of the subject-matter in dispute in the proposed appeal to the Privy Council. The part of the case which is proposed to be challenged before the Privy Council relates to the C Schedule properties with regard to which this Court fully affirmed the decree of the trial Court.

The question therefore resolves into this, whether when there has been a slight variation of the decree which is wholly in favour of the proposed appellant and about which he has no grievance and in regard to other matters the appellate decree has affirmed the decree of the trial Court, the appellate decree is a decree of affirmance or of variance within the meaning of section 110 of the Civil Procedure Code. There has unfortunately been considerable divergence of judicial opinion on this question. The matter came up before the Privy Council in *Annapurnabai* v. *Ruprao*[1] and the short judgment in that case has been interpreted by the various Courts in India in different ways. There, a person died issueless leaving two widows. The plaintiff claimed to have been adopted by the senior widow while the second defendant claimed to be the adopted son of the junior widow who was the first defendant. The plaintiff denied the second defendant's adoption and both the defendants denied the plaintiff's adoption. In the suit the plaintiff claimed certain property and in answer, while denying the plaintiff's adoption, the first defendant, the junior widow, claimed for herself maintenance at Rs. 3,000 per annum. Both the trial Court and the appellate Court concurred in holding that the plaintiff's adoption by the senior widow was proved. The first Court awarded maintenance to the first defendant, the junior widow, at Rs. 800 per annum while the appellate Court raised it to Rs. 1,200 per annum in other respects confirming the trial Court's decree. Defendants 1 and 2 applied for special leave. Sir George Lowndes arguing for the appellant stated before the Board that having regard to the concurrent findings, the petitioners desired to appeal only with regard to the amount of the maintenance. The respondent was not represented. The following short judgment of the Board was delivered by Lord Dunedin :

"In the opinion of their Lordships the contention of the petitioners' counsel as to the effect of section 110 of the Code is correct. They had therefore a right of appeal. Special leave to appeal should be granted, but should be limited to the question of maintenance. The petitioners' chance of success is not material to their application."

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1. (1924) L.R. 51 I.A. 319 : I.L.R. 51 Cal. 969 (P.C.).

Some Courts have construed this judgment to mean that the leave was limited to the question of maintenance only while other Courts have held that the general contention was approved that since there was a variation in the amount of maintenance although in favour of the petitioner before the Privy Council, the decree is not a decree of affirmance but one of variance for the purpose of section 110, Civil Procedure Code. Broadly speaking, Calcutta, Madras, Bombay and Lahore High Courts have adopted the former view while the Patna and Allahabad High Courts have followed the latter view.

The main decisions of the Calcutta High Court where this question was discussed are *Narendra Lal* v. *Gopendra Lal*[1] and *Bibhootibhooshan Datta* v. *Sreepati Datta*[2]. After adverting to *Raja Sree Nath Roy* v. *Secretary of State*[3], where the fundamental basis was laid down that if the two Courts were at one upon the matter which was to be in debate before the Privy Council then it is a case of a decree which affirms the decision of the Court immediately below, Rankin, C.J., examined the question whether the decision of the Privy Council in *Annapurnabai* v. *Ruprao*[4] had completely overruled that principle. The learned Chief Justice realised that the principle which was applied in *Raja Sree Nath Roy* v. *Secretary of State*[3], that you have to have regard to the subject-matter of dispute in appeal to the Privy Council must be taken as overruled and after making this remark he proceeded to observe :

> "The question is whether, on the strength of the only case before the Privy Council which we have for our guidance the views hitherto adopted in this and other High Courts require to be further considered. The question is whether the judgment of their Lordships means that in every case where the decree of the High Court is not a mere decree dismissing the appeal or a mere decree affirming the order of the Court below in the case, the necessity for showing a substantial question of law is done away with. It appears to me that the case of *Annapurnabai* v. *Ruprao*[4] is not in itself a sufficient authority to justify this Court in abandoning the principle which it has with other High Courts acted upon ; that is to say, I do not think that it shows that it is an erroneous view that we have to look to the substance and see what is the subject-matter of the appeal to His Majesty in Council."

The Privy Council decision was construed as meaning that where there is a dispute as to the amount of the decree or as to the amount of damages, the fact that the Courts differ and that the High Court differs in favour of the applicant does not mean that the decision is one of affirmance. Such doctrine, it is pointed out, could not be extended so as to justify the conclusion that though on a totally different point the applicant has succeeded in getting the first Court's decree modified and has no further grievance in that matter, yet he could without showing a substantial question of law, have a right to litigate upon other points upon which both the Courts were in agreement. This decision was followed in *Bibhootibhooshan Datta* v. *Sreepati Datta*[2] and the view taken by Rankin, C.J., as to the true effect of *Annapurnabai* v. *Ruprao*[4] was adopted in that decision. We will only refer to one decision of the Bombay High Court in *Kapurji* v. *Pannaji*[5], where despite a reference to *Annapurnabai* v. *Ruprao*[4] leave to appeal to the Privy Council was refused and the learned Chief Justice observed :

> "Now as regards that item both the Courts below were in agreement, and accordingly it is clear that the appeal to the Privy Council, if allowed, would be merely so far as the plaintiff is concerned, with reference to the havala item of Rs. 18,000. It would also be clear that as regards that item both the Courts below were agreed. Under these circumstances, we think that on the true construction of section 110, Civil Procedure Code, it is necessary that as the decision appealed from affirmed the decision of the Court below on this item, the appeal must involve some substantial question of law before it can be admitted."

There are two Full Bench judgments of the Lahore High Court where this question has been fully discussed and the entire case-law has been exhaustively surveyed. (*Brahma Nand* v. *S. D. Sabha*[6] and *S. K. Wahid-ud-din* v. *Makhan Lal*[7].) In the first case, after discussing the various aspects of the matter Din Mohammad, J., who wrote the leading judgment in the case pointed out :

1. A.I.R. 1927 Cal. 543.
2. (1934) I.L.R. 62 Cal. 257.
3. (1904) 8 C.W.N. 294.
4. (1924) L.R. 51 I.A. 319 ; I.L.R. 51 Cal. 969 (P.C.).
5. A.I.R. 1929 Bom. 359.
6. A.I.R. 1944 Lah. 329 (F.B.).
7. A.I.R. 1944 Lah. 458 (F.B.).

"If a decree of a Court of first instance is affirmed by the High Court no appeal lies to His Majesty in Council unless a substantial question of law is involved. Why should then a party be allowed to override the statutory provisions of law and to take his appeal to His Majesty in Council on a simple question of fact on which the High Court has agreed with the Court below merely because on a matter quite unconnected with it a variation has been introduced by the High Court against which he has no grievance whatever? The part varied by the High Court not being any longer under controversy the decree sought to be appealed against is obviously one of affirmance and is not appealable unless a substantial question of law is involved."

In the second Full Bench judgment of the same Court, the principle is reiterated that if the Court partly affirms and partly reverses the decision of a Court immediately below, the person aggrieved by the affirmed portion of the decree has no right of appeal to His Majesty in Council against that portion of the decree merely because in the other portion of the decree the variation has been made entirely to his satisfaction and he has no appealable grievance left in respect thereof. Reference was made in that case to sub-rules (1) and (2) of rule 4 as well as to rule 5 of Order 20, Civil Procedure Code, which make it abundantly clear that the finding of a Court upon each issue has been characterised as a "decision" by the Legislature and hence it cannot be true that the final adjudication of the suit alone can be described as such. This argument turns upon a distinction that was sought to be drawn between the words "decree" and "decision" occurring in clause 3 of section 110, Civil Procedure Code, to which we shall advert presently when we deal with one of the decisions of our own Court.

In this Court two decisions *Shunmuga Sundara Mudaliar* v. *Ratnavelu Mudaliar*[1] and *Periachiappa Chettiar* v. *Nachiappan*[2] in which leave to appeal to Privy Council was granted were cases where the subject-matter of the appeal was the liability to account, both being account suits. In the former case, the plaintiff sued for a general account as against a trustee alleging eight specific instances of malversation. Two of those charges were held by the first Court to have been proved. The defendant appealed in respect of those two charges while the plaintiff filed a memorandum of cross-objections in respect of the other six charges. The appeal was allowed and the memorandum of cross-objections was dismissed by this Court. Leave to appeal was granted negativing the contention that the case did not satisfy the requirements of the Code with regard to value as it was held that both the appeal and the memorandum of cross-objections constituted one decree and not two distinct decrees. The latter case was a suit for accounts against an agent valued at Rs. 40,000. The plaintiff got a decree for Rs. 5,682 against which the defendant appealed. The plaintiff preferred a memorandum of cross-objections claiming a decree for a further sum of Rs. 20,000. The appeal was allowed in part reducing the decretal amount by Rs. 4,000 and the memorandum of cross-objections was allowed only to the extent of Rs. 150. It was held that both the decree and the memorandum of cross-objections amounted to one decree and since the subject-matter of the suit in the trial Court and in the appeal was upwards of Rs. 10,000 the plaintiff's application for a certificate that he was entitled to appeal to His Majesty in Council was granted. These cases have been distinguished in the later decisions on the principle that the liability to account is one and entire and indivisible and that the decree covers both the appeal and the memorandum of cross-objections and cannot be split up for purposes of appeal to the Privy Council. At the same time it has been pointed out that oneness of the decree does not preclude the question being considered whether it comprises one decision or several decisions.

The case bearing upon this point where all aspects of the matter and the full implications of the Privy Council decision in *Annapurnabai* v. *Ruprao*[3] were discussed is the decision of Venkatasubba Rao and Cornish, JJ., in *Venkitaswami Chettiar* v. *Sakkutti Pillai*[4]. There the facts were these. *S* died leaving his widow the fourth defendant and two sons the first and second defendants. The third defendant was the son of the first defendant. The first and fourth defendants had executed after the death of *S* a mortgage bond in favour of the plaintiff. He sued on that bond

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1. (1928) 56 M.L.J. 476 : I.L.R. 52 Mad. 521.
2. (1930) 35 L.W. 206.
3. (1924) L.R. 51 I.A. 319 : I.L.R. 51 Cal. 969 (P.C.).
4. (1936) 71 M.L.J. 580.

and the trial Court passed a decree for the full amount claimed against defendants 1 and 4 who executed the bond and as regards the 2nd and 3rd defendants they were held liable only for a fraction of the debt. On an appeal filed by the plaintiff to the High Court the decree against defendants 1 and 4 was confirmed but so far as the third defendant was concerned, his share of the joint family property was held liable for almost the full amount claimed. The decree so far as the second defendant was concerned was confirmed. There was thus a variance only with regard to the third defendant to his disadvantage. The plaintiff applied for leave to appeal to the Privy Council in so far as his claim against the second defendant was disallowed. But as stated already, so far as the second defendant was concerned, the trial Court's decree had been affirmed. The question was whether in these circumstances the judgment of the High Court was an affirming one or not. Venkatasubba Rao, J., referred to the two Calcutta decisions cited above, *Narendra Lal* v. *Gopendra Lal*[1] and *Bibhootibhooshan Datta* v. *Sreepati Datta*[2] and pointed out that what is to be regarded is not the decision as a whole but the decision as it affects the subject-matter in dispute and that is the proper test. He said :

> "The right way of construing section 110 is to read the words 'decree or final order' in clause (3) in conjunction with and to treat them as relating to 'the subject-matter' mentioned in clause (1)."

He then referred to the Privy Council decision in *Annapurnabai* v. *Ruprao*[3] and observed :

> "Their Lordships, holding that the petitioners had a right of appeal, observed that the appeal should be limited to the right as to the maintenance allowance. The respondent was unrepresented and their Lordships disposed of the matter in two brief sentences. It is difficult to believe that the order was intended to be a considered pronouncement upon a subject of such great importance. Indeed there is reason to think in view of the difference in the wording of the order as reported in the volume of the Indian Appeals and that of the Indian Law Reports, Calcutta, that their Lordships did no more than grant special leave observing that the petitioners had a right of appeal. Is it to be inferred that the Judicial Committee left it open to the defendants to attack the concurrent finding as regards the plaintiff's adoption? Is it to be further held that their Lordships, without saying so abrogated the principles, which till then, the Indian Courts had, without question applied?"

It was however conceded in that ruling that the Privy Council case is authority for the position that if as regards the subject-matter in dispute in the appeal the appellate Court has varied the lower Court's decision, the appellate decree is not an affirming one. This decision was followed in *Velayya* v. *H. R. E. Board, Madras*[4], *K. V. Pandian* v. *Rev. Pignot*[5] and by a Bench consisting of Horwill and Kuppuswami Ayyar, JJ., in *Mahant Prayagdosji Varu* v. *T. T. Devasthanam Committee*[6]. In the first of these cases the Bench consisted of Venkatasubba Rao and Abdur Rahman, JJ., and the leading judgment was given by Venkatasubba Rao, J. He referred to his earlier decision in *Venkitaswami Chettiar* v. *Sekkutti Pillai* [7] and made a fresh point in this case which may be put in his own words. After adverting to the language of sections 109 and 110, Civil Procedure Code, he pointed out :

> "A careful reading of the relevant provisions will in my opinion dispel all difficulty. Sections 109 and 110, C. P. Code, deal with the matter under consideration and must be read together. . . . . The contention put forward misses the significance of the two different expressions employed in these provisions. In connection with the High Court, the words used are, 'the decree' whereas in regard to the lower Court, the expression is 'the decision'. I fail to see why these two expressions should be held to mean exactly the same thing. It is reasonable to hold that the legislature employed two different expressions to convey two different ideas. A single decree may comprise several decisions and each decision may relate to a distinct subject-matter. It is all the more necessary that this distinction should be kept in view as by ignoring it several anomalies would result as already shown."

In connection with the unreported decision of Horwill and Kuppuswami Ayyar, JJ., it may be noted in passing that an application for special leave was made to the Privy Council against the judgment of this Court in that appeal but the application was rejected by the Privy Council on 2nd August, 1946.

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1. A.I.R. 1927 Cal. 543.
2. (1934) I.L.R. 62 Cal. 257.
3. (1924) L.R. 51 I.A. 319 : I.L.R. 51 Cal. 969 (P.C.).
4. (1938) 1 M.L.J. 487.
5. (1942) 2 M.L.J. 350.
6. C.M.P. Nos. 3231 and 3232 of 1945.
7. (1936) 71 M.L.J. 580.

The question arose recently before a Full Bench of this Court in *Gangadhara Aiyar* v. *Subramania Sastrigal*[1]. There a reversioner to the estate of one Sundaram Iyer deceased sued for a declaration that the eleven items of properties belonged to his estate and that the deed of settlement executed by Sundaram Iyer's mother in respect of those properties was void, and not binding on him. The trial Court granted him a declaration only in respect of six of those eleven items and dismissed the rest of his claim. Defendants 2, 3 and 4 appealed to the High Court while the plaintiff filed a memorandum of cross-objections in respect of four of the remaining five items. The defendants' appeal was dismissed but the plaintiff's memorandum of cross-objections was allowed. The defendants proposed to appeal to the Privy Council in respect of the ten properties awarded to the plaintiff. The value of the eleven properties in suit was well over Rs. 10,000 but the value of the four properties referred to in the memorandum of cross-objections was only Rs. 9,190. The contention was that since there were concurrent findings so far as six of the properties were concerned the petitioners could appeal only with regard to the four properties awarded to the plaintiff by this Court on appeal and those items did not fulfil the requirement of section 110, Civil Procedure Code, with regard to value. Upon those facts the Full Bench found that the decree of this Court undoubtedly varied the decree of the trial Court in important respects because it gave four more items of properties to the plaintiff. Several decisions were cited and examined with reference to the scope of the Privy Council decision in *Annapurnabai* v. *Ruprao*[2] and the learned Chief Justice said :

> "There is here a pronouncement of the Judicial Committee that where there is a variance of the decree passed by the trial Court, the party affected thereby is entitled as of right to a certificate subject, of course, to the requirements of the Code being fulfilled with regard to value."

Referring to *Venkitaswami Chettiar* v. *Sekkutti Pillai*[3], the Full Bench said that they saw no reason to question the correctness of that decision on the peculiar facts of that case. The distinction that was drawn in Venkatasubba Rao's judgment between the words "decree or final order" in clause (3) of section 110 and the term "the subject-matter" mentioned in clause (1) was specifically referred to without dissent. With reference to the decisions in *Velayya* v. *H. R. E. Board, Madras*[4] and *Chockalingam Chetty* v. *The Official Assignee of Madras*[5], it was pointed out that they do not go beyond *Venkitaswami Chettiar* v. *Sekkutti Pillai*[3].

The opposite view finds expression in the decision of a Special Bench of three Judges of the High Court at Patna in *Brajisundar Deb* v. *Rajendra Narayan*[6], which followed a Full Bench decision of the Allahabad High Court in *Jaggo Bai* v. *Harihar Prasad Singh*[7]. The former case overruled the decision of the same High Court in *Mahabir Prasad* v. *Brij Mohan Prasad*[8], which had acted upon the view taken in the Calcutta, Madras, Bombay and Lahore High Courts. The Patna Special Bench reviewed the various authorities on the subject and while observing that the point involved was a difficult one considered the true test in the light of the Privy Council decision in *Annapurnabai* v. *Ruprao*[2], to be whether the decision of the Court below as a whole had been affirmed by the High Court and not whether the decision on the point or points left in dispute had been affirmed by the High Court. In the opinion of the Special Bench the expression "decision of the Court immediately below the Court passing such decree" used in section 110 means the same as the expression "decree of the Court below," a view which as indicated before is directly in conflict with that uniformly taken by this Court in a series of decisions some of which have been cited above.

The four Bench decisions of this Court which have been discussed above must be held to be still in force and acting upon these decisions we must hold that when

1. (1946) 2 M.L.J. 69 (F.B.).
2. (1924) L.R. 51 I.A. 319 : I.L.R. 51 Cal. 969 (P.C.).
3. (1936) 71 M.L.J. 580.
4. (1938) 1 M.L.J. 487.
5. (1940) 2 M.L.J. 645.
6. (1941) I.L.R. 20 Pat. 459 (S.B.).
7. I.L.R. (1941) All. 180 (F.B.).
8. (1936) I.L.R. 15 Pat. 637.

the appellate decree modifies the original decree upon a single point and that completely in the appellant's favour so that he has no further grievance in that matter, he cannot have because of that modification, a right of appeal on other points on which the Courts have concurred without showing that there is a substantial question of law involved. It is well known that the course normally pursued by their Lordships of the Privy Council is not to disturb the concurrent findings on questions of fact and it would be indeed curious that the provisions of the Code should have been so framed as to allow a litigant to take an appeal to the Privy Council on a single question of fact which has already been concluded by such concurrent findings of fact which will not ordinarily be disturbed. If the subject-matter of the dispute in appeal had been the amount of the decree or the amount of damages a variation whether to the prejudice or in favour of the petitioner would not alter the decree of variance into one of affirmance. But where the question in dispute is on a totally different point such as the question of debts due by the family, as in the present case, in regard to which the applicant has succeeded and succeeded altogether so that he has no further grievance in the matter, he cannot without showing a substantial question of law have a right to litigate upon other points upon which the Courts have been in agreement. It need hardly be added that treating the decree as one of affirmance there is no substantial question of law involved, since the correctness of the principles applied to the facts of this case has not at any time either during the appeal or at the hearing of this petition been challenged. Both the objections raised by the respondents have to be upheld. The requirements of section 110 as regards the value have not been fulfilled. The decree is one of affirmance and no substantial question of law is involved. The petition is dismissed with costs of the first respondent.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CLARK.

Palacherla Venkata Rao and others being minors represented by Mother and Guardian Venkayamma .. *Petitioners**

v.

Paladugula Rattamma and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 9, rule 15 and Order 21, rule 90—Mortgage suit against minors—Uncle appointed guardian ad litem—Decree and sale—Application filed under Order 21, rule 90 by mother as next friend and security bond also filed—Return of bond for furnishing particulars—Time granted till a particular date—Calling of the application and dismissal for default on the date fixed—Jurisdiction to dismiss application—Presentation of petition by a wrong person as next friend not a nullity.

In a mortgage suit against minors represented by their uncle as guardian *ad litem*, a decree for sale was obtained. On 12th October, 1943, the property was brought to sale. On November 1st, 1943, the defendants (minors) by petition through their mother filed an application under Order 21, rule 90, Civil Procedure Code and later filed a security bond also in the proceedings under Order 21, rule 90. The security bond was returned for obtaining certain correct information, and time was granted till 3rd December, 1943. But the petition was called for hearing on 3rd December, 1943, and dismissed for default of appearance of petitioners. The petitioners applied to have the order of dismissal set aside and it was dismissed on the ground that Order 9, rule 15, Civil Procedure Code, had no application to such a matter. An appeal also was filed against the order of 3rd December, 1943. The respondents raised an objection in this appeal that the application under Order 21, rule 90 was bad inasmuch as in it the minors were represented by their mother, whereas their uncle was the guardian *ad litem* appointed by the Court and this was upheld. In revision,

Held, (1) that when time was given for the performance of any act till a particular date, the time given includes that date also. Hence the rejection of the application on the 3rd December, 1943, was without jurisdiction. *Perumal Nadan* v. *Sivanamji Nadachi*, (1915) I.L.R. 39 Mad. 583 and *Chinniah Chettiar* v. *Kumaraswamiah*, (1933) M.W.N. 88, referred to.

(2) That the petition filed by the person other than the person appointed by the Court as guardian *ad litem* is not a nullity. Hence the dismissal on that ground also was not proper.

Rarichan v. *Manakkal Raman Somayajipad*, (1922) 44 M.L.J. 515 at page 518, applied and *Hansraj* v. *Khem Chand*, I.L.R. (1938) All. 829, dissented from.

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* C. R. P. No. 226 of 1945. 1st April, 1946.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree of the District Court of East Godavari at Rajahmundry dated 2nd October, 1944 and passed in C. M. A. No. 7 of 1944, preferred against the order of the Court of the District Munsiff of Rajahmundry, dated 3rd December, 1943 and made in an unregistered execution application S. R. No. 11056 of 1943 in E. P. No. 38 of 1943 in O. S. No. 63 of 1941.

M. S. Ramachandra Rao for Petitioners.

P. V. Vallabhacharyulu for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners are minors. They were defendants in O. S. No. 63 of 1941 on the file of the District Munsiff of Rajahmundry. That suit was a mortgage suit and the plaintiff obtained a decree for sale. The property was brought to sale at a court-auction on the 12th October, 1943. On the 1st of November, 1943, the petitioners represented by their mother filed an application under Order 21, rule 90. In the suit, their uncle had been appointed guardian *ad litem* and that appointment had never been cancelled. On the 22nd November, 1943, the petitioners filed a security bond in the proceedings under Order 21, rule 90. The bond was returned to them on the 26th November, 1943. The reason for that return is stated as follows in an endorsement on the affidavit :

"1. The security bond should clearly state whether the property described belongs exclusively to the surety or whether it belongs to the minor judgment-debtors.

2. An affidavit stating the interest of the surety in the property should be filed."

This endorsement closed with the following remark :

"Returned. Time till 3-12-43."

There is a further endorsement on the affidavit under date 3rd December, 1943, as follows :

"An affidavit in support of the bond is herewith filed. It is now stated in the security bond that the surety has sole and absolute rights in the property offered as security. The bond may be accepted. Represented."

A further endorsement appears on the affidavit dated 6th December, 1943, which reads as follows :

"The petition was called and rejected on 3rd December, 1943, as there was no representation. Returned."

It is clear from these endorsements—and the entries in the B Diary substantially confirm them—that after time had been granted until 3rd December for the filing of the further affidavit the case was called on that day and dismissed for want of appearance. The endorsements also show that in fact on some time on that day, namely, the 3rd December, 1943, the necessary affidavit was filed and accepted presumably in the office of the Court.

The petitioners applied to have this order of dismissal set aside but their application was rejected on the ground that Order 9, rule 15, Civil Procedure Code, had no application to such a matter. They then filed an appeal against the order of the 3rd December, 1943. Notice of the appeal was issued to the present respondents and it will be appreciated that this was the first occasion on which the respondents had an opportunity of raising any objection to the application under Order 21, rule 90 of the Civil Procedure Code. On appeal in the lower Court, the respondents objected that the application under Order 21, rule 90 was bad inasmuch as in it the minors were represented by their mother whereas their uncle was the guardian *ad litem* appointed by the Court. Reliance was placed on Order 32, rule 3 (*a*) of the Code.

The learned District Judge upheld that objection and also held against the petitioners on their contention that the application could not properly be dismissed in view of the fact that they had time within which to file the required additional affidavit until the end of the day fixed, namely, 3rd December, 1943.

With regard to the first point raised by the petitioners, I have no hesitation in holding that the dismissal of the petition on that ground was a dismissal without jurisdiction. When time is given, as it was in this case, for the performance of any act till a certain date, the time given includes that date also. See *Perumal Nadan* v. *Sivanamji Nadachi*[1] and *Chinniah Chettiar* v. *Kumaraswamiah*[2]. Here in effect the Court disposed of the matter as though time had been granted till the 2nd December, 1943. In that event a calling of the case on the 3rd December for the purpose of filing the required additional affidavit would have been in order ; but as time fixed was "till 3rd December, 1943," I do not consider that any order of dismissal for default, when as is clear here the purpose of the hearing was for the filing of the additional affidavit, can be regarded as a proper exercise of the jurisdiction of the Court. On this ground alone I would be prepared to allow the application for revision.

It is necessary however to consider the further point. It is contended that the application under Order 21, rule 90, Civil Procedure Code, filed on behalf of the minors is a nullity inasmuch as it is filed by a person other than the guardian *ad litem* appointed to act on their behalf in the suit. I am not prepared to agree. Order 32, rule 2 provides :

> "Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented."

It was held in *Rarichan* v. *Manakkal Raman Somayajipad*[3] :

> "If on an issue raised and tried in the case, the Court finds that the plaintiff is a minor it should not dismiss the suit at once but should allow a reasonable time for a next friend to come on record and go on with the suit and it is only if no one comes forward that it should reject the plaint."

This view was expressed at page 518 of the judgment in that case. The principle applicable seems to me to be the same whether the case is one of filing a proceeding without a guardian *ad litem* or filing it with the wrong next friend. It has been brought to my notice that the Allahabad High Court held in *Hemraj* v. *Khem Chand*[4] that a petition of objections filed on behalf of the minor in execution proceedings by some person other than the person appointed in the suit as his guardian *ad litem*, is not maintainable. If this decision amounts to a decision that a petition filed on behalf of the minor by some person other than the person appointed as guardian *ad litem* must necessarily be a nullity, I must respectfully decline to follow it. It seems to me that whether or not in such circumstances time should be allowed for the correct guardian *ad litem* to be brought on to the record if he so desires is a matter which can be decided only on the facts of the particular case. In the present case, as pointed out earlier, the respondents had no notice of this petition until the matter was on appeal against the order of dismissal. I propose to set aside the order of the District Munsiff and the upholding of it on appeal by the District Judge and return the application to the District Munsiff for consideration. He will take up the matter in the position that it stood in on the 3rd December, 1943, and will hear and dispose of any objection which may be raised against the maintainability of the application on the ground that the person purporting to act as guardian *ad litem* is not entitled to file the application. There will be no order as to costs of this petition.

K.C. *Petition allowed.*

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1. (1915) I.L.R. 39 Mad. 583.
2. (1933) M.W.N. 88.
3. (1922) 44 M.L.J. 515.
4. I.L.R. (1938) All. 829.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Rajah of Venkatagiri .. *Appellant* in A. A. A. O. and Petitioner in C. R. P. (Plaintiff)*

v.

Atmakuri Ramaswami .. *Respondent in both.*

Madras Estates Land Act (I of 1908), sections 131 and 132—Sale for arrears of rent—Application to set aside—Irregular order—Appealability—Civil Procedure Code (V of 1908), section 47 and Order 21, rule 90—Applicability.

The Madras Estates Land Act contains a simplified law of procedure in execution of rent decrees which excludes the application of the execution provisions of the Civil Procedure Code. Where on an application to set aside a sale for arrears of rent, the Sub-Collector held that there were irregularities in the conduct of the sale resulting in substantial injury to the judgment-debtor and consequently set aside the sale but he did not state under what provision of law he was acting,

Held, that the order of the Sub-Collector could not be treated as an order under Order 21, rule 90 or under section 47, Civil Procedure Code, and that it was no more than an irregular order passed under sections 131 and 132 of the Madras Estates Land Act, against which no appeal lay.

Jagannatha Pillai v. *Kathaperumal Pillai*, (1927) 53 M.L.J. 688 : I.L.R. 51 Mad. 76, relied on.

Appeal against and petition under section 115 of Act V of 1908, to revise the Order of the District Court of Guntur, dated 22nd September, 1944 and made in A. S. No. 10 of 1944 (E. P. No. 175 of 1939, in R. S. No. 71 of 1935, Sub-Collector's Court, Ongole).

K. Subba Rao for Appellant.

M. V. Nagaramayya for Respondent.

The Court delivered the following

JUDGMENT.—This appeal and the civil revision petition which is filed in the alternative, arise out of an order of the District Judge of Guntur dismissing an appeal from the order of the Sub-Collector of Ongole setting aside a sale held in execution of a decree for rent under the Madras Estates Land Act. The appellant here is the Rajah of Venkatagiri who is the decree-holder. The decree was passed on the 20th August, 1936, against the respondent and three others for rent on a particular holding. It would appear that before this decree was passed the holding had become sub-divided and an application had been made for the issue of separate pattas, but, we have no evidence of the precise date on which this division of the land was recognised by the land-holder. Madras Act IV of 1938 came into force on the 22nd March, 1938. In 1939 the decree-holder sought to execute the decree by the sale of the holding. Thereafter there was an objection by the present respondent on the ground that he had paid the arrears of rent due for faslis 1346 and 1347 and that by reason of section 15 of Madras Act IV of 1938, the decree for earlier arrears must be deemed to have been satisfied. On this petition the Sub-Collector passed the order "Execution will proceed." After a portion of the holding had been sold, there was a further petition by the respondent in which he alleged that he had sold some of the lands to one Perantalu and that separate pattas had been given to himself and his vendee, that he himself had paid the arrears for faslis 1346 and 1347 due on his separate patta and he prayed that the sale already held might be set aside. This petition was dismissed for the default of the petitioner. Again the respondent filed a petition to set aside the *ex parte* order and restore the petition and after various proceedings with which we are not now concerned the District Court directed the Sub-Collector to inquire into the objection petition and decide whether there was sufficient ground for setting aside the sale. Thereupon the Sub-Collector restored the petition to file and took up the inquiry into the objection petition and held that the proceedings in the sale were very irregular, particularly in that the decree-holder did not implead the alienee and did not give notice of the sale to the Official Receiver who was impleaded in the execution

* A. A. A. O. No. 28 of 1943 & C. R. P. No. 158 of 1945. 27th February, 1946.

petition, nor was the sale proclamation published in the manner required by section 116 of the Estates Land Act. Without stating under what provision of law he was acting, the Sub-Collector held that all these irregularities resulting in substantial injury to the judgment-debtor rendered it necessary to hold that the sale was null and void and hence it was set aside. Against this decision an appeal was taken by the decree-holder to the District Court which held that the proceedings before the Sub-Collector must be deemed to be proceedings under Order 21, rule 90, of the Code of Civil Procedure and on the strength of the decision of Patanjali Sastri, J., in *Suryanarayana* v. *Sree Rajah Sobhanadri Appa Rao Bahadur*[1], the District Judge held that no appeal lay.

It is contended before me firstly, that though the Sub-Collector had no jurisdiction to proceed under Order 21, rule 90, if he purports to do so, his order under that section will attract the right of appeal prescribed under order 43, rule 1 (*i*) or alternatively; if the decision already cited must be taken to negative that contention, the finding of the Sub-Collector that the sale was null and void for want of proper notice brings the case within the decision of the Full Bench in *Rajagopala Ayyar* v. *Ramanujachariar*[2], so that the matter comes under section 47 of the Code of Civil Procedure and an appeal will lie from the decision. The decision of the Bench in *Jagannatha Pillai* v. *Kathaperumal Pillai*[3] which was passed under the Estates Land Act prior to the recent amendments was to the effect that section 132 of the Estates Land Act by making the provisions of Chapter VI of the Act applicable to the execution by a Revenue Court of any decree for rent, provides a complete code of procedure in execution and section 192 of the Estates Land Act which applies the provisions of the Code of Civil Procedure to proceedings under the Estates Land Act must be read subject to section 132. Patanjali Sastri, J., in *Suryanarayana's case*[1] already quoted held that the amendment of section 192 did not affect the validity of the principle laid down in *Jagannatha Pillai* v. *Kathaperumal Pillai*[3]. This decision has been followed by Horwill, J., in *Sarvarayudu* v. *Venkatarathnam*[4], where it was held that a suit brought by one of the parties under a decree, which would be barred under section 47 of the Code of Civil Procedure if that section was applicable to proceedings in execution of a decree of a Revenue Court under the Madras Estates Land Act, was not so barred.

It seems clear that if the decision of Patanjali Sastri, J., in *Suryanarayana* v. *Sree Rajah Sobhanadri Appa Rao Bahadur*[1], and that of Horwill, J., in the case just quoted are correct, whether this order of the Sub-Collector be deemed to be an order under Order 21, rule 90 or an order under section 47 of the Code of Civil Procedure, no appeal would lie. There cannot, I think, be any question in this case of the application of the rather debatable principle that the wrongful assumption of the jurisdiction under an appealable provision of law may attract the right of appeal which the law provides against the order when passed by the Court which has jurisdiction to pass it. In the present case, the Sub-Collector who passed this order did not purport to pass it under any stated provision of law. It is true that the decretal order as drafted quotes section 131 of the Estates Land Act which makes provision only for the setting aside of sales on deposit of the sale amount by the defaulter. Clearly that section did not empower the Sub-Collector to pass the order which he passed. It seems that the Sub-Collector, without considering precisely what his powers were, took upon himself the right to set aside the sale merely because he thought the sale was a bad one. There can be little doubt that the proceedings were totally irregular though his order may well be a substantially just order.

I do not feel that there are any grounds for me to differ from the view taken by my learned brothers Patanjali Sastri and Horwill, JJ., that the principle embodied in *Jagannatha Pillai* v. *Kathaperumal Pillai*[3] holds good even under the amended

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1. (1940) 2 M.L.J. 584.
2. (1923) 46 M.L.J. 104: I.L.R. 47 Mad. 288 (F.B.).
3. (1927) 53 M.L.J. 688: I.L.R. 51 Mad. 76.
4. (1945) 1 M.L.J. 332.

Estates Land Act. It is true that there is a judgment of Kuppuswami Ayyar, J., in *Peran Ambalagaran* v. *Venkatarama Naicker*[1], which contains certain observations which seem to point in a different direction, but so far as the decision itself was concerned, it had nothing to do with execution and the learned Judge's attention does not seem to have been drawn to the decision in *Suryanarayana* v. *Sree Rajah Sobhanadri Appa Rao Bahadur*[2]. There are moreover solid grounds of expediency which doubtless led the Legislature to prescribe a simplified execution procedure for decrees of Revenue Courts. It is not desirable that Revenue Courts should be given the function of deciding purely civil disputes between parties connected with execution and it is reasonable to suppose that it was the intention of the Legislature to lay it down that when the matter is merely one of getting a sale set aside on deposit the Revenue Court can do it, but if the parties wish to challenge a sale on grounds which strike at the root of its legality or if they wish to challenge the execution by reason of some dispute of a civil nature relating to the rights of the parties, the proper Court to decide such matters is not the Revenue Court but the civil Court. At any rate there is a clear and simplified procedure laid down in the Estates Land Act and there is no reason why that procedure should be elaborated by the introduction of section 47 of the Civil Procedure Code any more than it is to be elaborated by the introduction of Order 21, rule 90.

My attention has been drawn to the decision of Devadoss, J., in *Sundaraswamiar* v. *Narayanaswamiar*[3], in which the learned Judge without reference to the Bench decision in *Jagannatha Pillai* v. *Kathaperumal Pillai*[4] (to which he was a party) held that an application under section 47 of the Code of Civil Procedure can be filed in a Revenue Court on a matter connected with rights under a mortgage created before the passing of Madras Act I of 1908. That decision seems to me with great respect to run contrary to the principle of the Bench decision in *Jagannatha Pillai* v. *Kathaperumal Pillai*[4]. I have not been shown that it has ever been followed by this Court and the decision of Horwill, J., in *Sarvarayudu* v. *Venkataratnam*[5], is directly contrary to that decision. It seems to me that to admit the right of a party to contest a sale in a Revenue Court by proceedings under section 47 would be to nullify the rule laid down by the bench in *Jagannatha Pillai* v. *Kathaperumal Pillai*[4] to the effect that the Estates Land Act contains a simplified law of procedure in execution of rent decrees which excludes the application of the execution provisions of the Code of Civil Procedure.

I am therefore of opinion that the order of the Sub-Collector cannot be treated as an order either under Order 21, rule 90 or under section 47 of the Code of Civil Procedure and it does not purport to be under either of these provisions, at any rate expressly. It is no more than an irregular order passed under sections 131 and 132 of the Estates Land Act against which order no appeal lies. I have been asked to interfere in revision to rectify the errors in this order. No revision petition against the Sub-Collector's order has been filed before me. Although the order of the Sub-Collector appears to be irregular, it does not appear to be unjust and in effect what the Sub-Collector has done is to give the remedy which should properly have been obtained by the filing of a suit in a Civil Court. In the absence of any injustice in the order, I do not feel disposed to interfere in revision.

The result therefore is the appeal is dismissed with costs. The alternative revision petition is also dismissed; no separate costs.

B.V.V. *Appeal and Revision dismissed.*

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1. (1943) 2 M.L.J. 193.
2. (1940) 2 M.L.J. 584.
3. A.I.R. 1928 Mad. 1107.
4. (1927) 53 M.L.J. 688 : I.L.R. 51 Mad. 76.
5. (1945) 1 M.L.J. 332.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Annan Narasimha Ayyar .. *Petitioner**

v.

Rangathayammal .. *Respondent.*

Criminal Procedure Code (V of 1898), section 488 (4)—Scope—Application for maintenance by wife—Plea in defence of separate living by mutual consent for over seventeen years—Maintainability of wife's claim—Quantum of maintenance—Considerations in fixing.

Where a wife claimed maintenance under section 488, Criminal Procedure Code and the husband contended that himself and his wife had been living by mutual consent separately for a period of seventeen years so as to bring the case within sub-section (4) of section 488, Criminal Procedure Code,

Held, (1) that mutual consent involves the consent of both parties, and if any one of them decides to put a stop to separate living, sub-section 4 ceases to operate and then the wife gets her right to claim maintenance subject to such defences as the husband may have under section 488. In the absence of such defences in the present case the wife would be entitled to her maintenance.

(2) As regards fixing the quantum of maintenance, such factors as the husband's commitments concerning his own family by his second wife and the sudden drain, the payment of maintenance, would cause upon his slender resources would have to be taken into consideration.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate of Salem dated 29th June, 1946, and passed in M. C. No. 9 of 1946.

D. Ramaswami Aiyangar and *S. Kuppuswami* for Petitioner.

O. K. Ramalingam for Respondent.

The Court made the following

ORDER.—This matter arises out of maintenance proceedings under section 488 of the Criminal Procedure Code. The husband is the petitioner and he seeks to set aside the order of maintenance made against him to pay the respondent, his wife, a monthly allowace of Rs. 15 as from 29th June, 1946. The main contention raised on behalf of the petitioner is that himself and the respondent have been living by mutual consent separately for a period of seventeen years. The respondent says that the period is only twelve years. It is not necessary to resolve the difference as by mere separate living it cannot be said that the married status between the husband and the wife has come to an end. Sub-section 4 of section 488 provides that the wife will not be entitled to maintenance if the parties have been living separately by mutual consent. Mutual consent involves the consent of both parties and if any one of them decides to put a stop to separate living sub-section 4 ceases to operate. Then the wife gets her right to claim maintenance subject to such defences as the husband may have under section 488. There are no such defences raised here. I agree with the Court below that the respondent is entitled to maintenance from the petitioner. As regards the quantum there are several factors which have to be taken into account in favour of the petitioner. On account of the long separate living of the respondent the petitioner has re-married and has some children through his second wife. He has made commitments and after so many years a sudden drain of this kind upon his slender resources would simply crush him. It is said by the respondent that he has four looms but the Magistrate actually finds that he has two looms and he has no immovable property or any other source of income. So far as the respondent is concerned she has been so long maintained by her relations. It would appear that she herself has been earning at least Rs. 7 per month. Taking all these matters into consideration the amount awarded by the lower Court of Rs. 15 appears to be on the high side. It is reduced to Rs. 7-8-0 per month from 29th June, 1946.

K.C. ——— *Order varied.*

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* Cr. R. C. No. 855 of 1946. 18th November, 1946.
(Cr. R. P. No. 822 of 1946).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Mayilvahanam and others .. *Petitioners**.

Evidence Act (I of 1872), section 25—Assistant Inspector of Customs invested under the Sea Customs Act with powers of arrest, search, seizure—Not a police officer within the meaning of S. 25 of the Evidence Act—Statement made to him admissible in evidence.

The Assistant Inspector of Customs is not a police officer within the meaning of section 25 of the Evidence Act as the section should not be extended to other classes of officers merely on the ground of similarity of function. So, where statements are made by the accused to the Assistant Inspector of Customs, such statements are not hit by section 25 of the Evidence Act and are hence admissible in evidence.

Case-law reviewed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of East Tanjore Division at Negapatam, dated 6th March, 1946, and passed in C. A. No. 3 of 1946, (C. C. No. 181 of 1945 on the file of the Court of the Additional First Class Magistrate, Negapatam).

V. Rajagopalachariar and *K. N. Srinivasan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The seven petitioners were convicted by the Additional First Class Magistrate of Negapatam under rule 84 (3) read with rule 121 of the Defence of India Rules punishable under rule 84 (6) of the same rules. On appeal the Sessions Judge of East Tanjore at Negapatam confirmed the conviction but reduced the sentences. The case against the accused was that they transported rice by sea from British India to Ceylon which is prohibited under a notification issued under rule 84 (3) of the Defence of India Rules. The learned Sessions Judge has set out the facts with care in his exhaustive judgment. The conviction depends exclusively upon the statements made by each of the petitioners to the Assistant Inspector of Customs who proved them as P. W. 1. The main contention throughout on behalf of the accused has been that these statements are not admissible in evidence being repugnant to the provisions of section 25 of the Indian Evidence Act. Under that section, no confession made to a police officer can be proved as against a person accused of any offence. It is the petitioners' contention that since the Assistant Inspector of Customs is invested under the Sea Customs Act with certain powers of search, arrest and seizure he should be deemed to be a police officer for the purpose of section 25. In support of this proposition he relies on two decisions of the Calcutta and the Bombay High Courts and on a decision of a Bench of this Court in *Someshwar H. Shelat* In re[1]. The Calcutta decision was that of a Full Bench in *Ameen Sharif* v. *Emperor*[2] and the Bombay case is *Nanoo Sheik Ahmed* v. *Emperor*[3]. That is also a decision of a Full Bench. Both these cases related to excise officers and it was held therein that an excise officer is a police officer within the meaning of section 25 of the Indian Evidence Act. In this Court, however, the contrary view has been uniformly taken upon the language employed in the Madras Excise Act as contra-distinguished from the language in the Bengal Excise Act and the Bombay Excise Act. The Bengal Excise Act makes the excise officers for the purpose of section 25, police officers, and it is upon this provision contained in the Bengal Excise Act that the Calcutta Full Bench rested its conclusions. The Bombay Excise Act also is similar to the Bengal Excise Act. In the Madras Excise Act however there are no provisions which confer the same amount of powers on the excise officers in this Presidency as in the Bombay and Calcutta Excise Acts. It is for this reason that this Court has in a number of decisions held the view that upon the construction of the Madras Excise Act excise officers in this Province cannot be deemed to be

* Cr. R.C. No. 279 of 1946. 1st November, 1946.
(Cr. R. P. No. 272 of 1946).

1. (1946) 1 M.L.J. 368.
2. (1934) I.L.R. 61 Cal. 607 (F.B.).
3. (1926) I.L.R. 51 Bom. 78 (F.B.).

police officers within the meaning of section 25 of the Indian Evidence Act. The decisions are *Mahalakshmayya* v. *Emperor*[1] and *Doraiswami Nadar* v. *Emperor*[2] decided by Sundaram Chetti, J. and Bardswell, J., sitting separately. The last decision was by Horwill, J., in *Public Prosecutor* v. *Marimuthu Goundan*[3]. In that case the learned Judge on a scrutiny of the relevant provisions of the Madras Excise Act observed :

> "It appears to me that as section 25 (Evidence Act) refers only to a Police officer, a Court should not extend it to other classes of officers merely on grounds of similarity of function especially in view of the fact that the Evidence Act was introduced at a time when the methods of the Police were much more open to attack than they are now."

It will be noticed that all these cases are concerned with excise officers, but the decision of a Bench of this Court in *In re. Someshwar H. Shelat*[4], on which Mr. Rajagopalachari relied on behalf of the petitioners, was one in which the position of officers of the Commercial Tax Department fell to be considered *vis-a-vis* the provisions of Hoarding and Profiteering Prevention Ordinance. In that Ordinance sub-section (3) of section 12 is in these terms :

> "The Controller-General and such Inspectors and other officers as may be empowered by the Central or the Provincial Government in this behalf shall, within the respective areas for which they are appointed have power to investigate all offences punishable under this Ordinance, and in conducting any such investigation shall, within the said areas, have all the powers, duties, privileges, and liabilities of an officer, in charge of a police station under the Code of Criminal Procedure, 1898 (Act V of 1898) when investigating a cognizable offence within the limits of his station."

Relying exclusively upon the phraseology employed in that sub-section the Bench held as under :

> "That he (the Commercial Tax Officer) is a police officer within the meaning of the section we have no doubt whatever. Section 12 (3) of the Hoarding and Profiteering Prevention Ordinance expressly gives him all the powers, duties and privileges of an officer in charge of a police station under the Code of Criminal Procedure, 1898, when investigating a cognizable offence within the limits of his station. Therefore he has the full status of a police officer and his powers and duties must be limited to those of a police officer under the Code of Criminal Procedure which means that he has no right in an investigation under the Ordinance to require a person to sign a statement and where such a statement is reduced to writing it can only be used in accordance with the provisions of section 162 of the Code of Criminal Procedure or section 27 of the Evidence Act."

It is thus clear that the concerned officer was deemed to be a police officer for the purpose of section 162 of the Code of Criminal Procedure, because in the Ordinance itself it was specifically mentioned that in conducting investigations the particular officers shall have all the powers, duties, privileges and liabilities of an officer in charge of a police station under the Code of Criminal Procedure. The question whether such statements are confessions made to a police officer within the meaning of section 25 of the Evidence Act did not arise there for consideration. The defence counsel draws attention to sections 169, 171, 173 and 178 of the Sea Customs Act under which certain powers of search, stopping vessels and searching for goods, arresting persons reasonably suspected, arresting persons escaping and seizing things liable to confiscation, have been conferred on the Customs officers, but it will be seen that the language analogous to that employed in section 12 (3) of the Hoarding and Profiteering Prevention Ordinance is not found in the Sea Customs Act, nor even language similar to the language employed in the Bengal Excise Act or in the Bombay Excise Act. In fact this Court has taken the view as would appear from Horwill J.'s decision cited above that the provisions of section 25 should not be extended to other classes of officers merely on the ground of similarity of function. I agree with the learned Sessions Judge that the statements given by the petitioners in Ex. C series before the Assistant Inspector of Customs, P. W. 1, are not hit at by section 25 of the Evidence Act.

It is conceded that if these statements are admissible in evidence the guilt of the petitioners is established beyond question. The conviction of all the petitioners must therefore be confirmed. The only question that remains is one of sentence.

1. (1932) M.W.N. Crl. 69.
2. (1934) M.W.N. Crl. 67.
3. (1938) 1 M.L.J. 238.
4. (1946) 1 M.L.J. 368.

It is pointed out that all the petitioners were boatmen in the employ of a person in Ceylon. They have been in remand for thirty-four days and they had obviously been used by others as mere instruments. The sentences of rigorous imprisonment awarded to accused 1, 3, 4 and 6 are reduced to the periods already undergone. The sentences of fine against all of them will stand.

V.P.S. ——— *Convictions confirmed but sentences reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

A. S. Subramanya Ayyar and others .. *Petitioners.**

Penal Code (XLV of 1860), section 216-A—Charge of harbouring person alleged to have committed dacoity—Acquittal of persons harboured of substantive offence of dacoity—Effect—Persons who harboured them—If can be held guilty.

When persons charged with the substantive offence of dacoity or robbery have been acquitted of that offence, another person who is said to have intended to screen them from legal punishment in respect of that offence cannot be held guilty of harbouring the alleged offenders under section 216-A, Indian Penal Code.

Queen-Empress v. *Swaminatha*, (1890) 1 M.L.J. 163 : I.L.R. 14 Mad. 400, applied ; *Rangaswami Goundan*, In re, (1928) 55 M.L.J. 503 : I.L.R. 52 Mad. 73, referred to.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Additional First Class Magistrate, Chittoor, dated 25th June, 1946, in C. C. No. 163 of 1946.

V. T. Rangaswamy Aiyangar and *K. Kalyanasundaram* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The case brought against the petitioners as gathered from a part of the charge sheet filed in this case is that they committed an offence under section 216-A, Indian Penal Code. The allegation against them is that, knowing full well that four persons mentioned in the charge sheet had all, along with others committed dacoity on the night of 11th February, 1946, at Tirupati by forcibly removing the cinema amplifier from police custody and that a case of dacoity had been registered against them and that they were wanted in that case, they harboured those four persons from 16th February, 1946, to March 1946 with food, shelter and money at Tirupati with the intention of screening them from punishment and to make them evade apprehension in P. R. Case Nos. 4 and 5 of 1946. The four persons mentioned in the charge sheet as the individuals who were harboured by the petitioners were tried along with others for offences under sections 395 and 353, Indian Penal Code. The Magistrate who tried them found that there was no evidence on record to justify the case being placed before the jury against any of the accused therein with regard to either of the offence of dacoity or the offence of assaulting a public servant and that there were no grounds to commit the accused to take their trial in the Court of Session. He directed the discharge of the accused persons. The result of the discharge is that the four persons cited as P. Ws. 1 to 4 in the charge sheet in the present case and who are stated to have committed dacoity, and in respect thereof harboured by the petitioners have been by a judicial order which has become final absolved altogether from any liability in respect of the alleged crime of dacoity.

The question raised upon these facts by Mr. Rangaswami Ayyangar on behalf of the petitioners is that in view of the discharge of the four persons, who were stated to have been harboured by the petitioners, of the offence of dacoity the prosecution of the petitioners under section 216-A, Indian Penal Code, is untenable. Section 216-A reads thus so far as is material to the present case :

"Whoever knowing or having reason to believe that any persons have recently committed dacoity harbours them or any of them with the intention of screening them or any of them from punishment shall be punished with rigorous imprisonment for a term which may extend to seven years."

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* Crl. R.C. No. 1039 of 1946. (Crl. R. P. No. 994 of 1946). 18th November, 1946.

The contention of the learned counsel is that the intention to screen certain persons from punishment in respect of an offence of dacoity actually committed by them is the essential ingredient of section 216-A and no person can be prosecuted in the absence of a proof of the existence of such intention. When however in law no offence of dacoity has been committed by the persons to whom shelter was given there is no question of harbouring them within the meaning of section 216-A.

The question raised is one of first impressions and though there are a number of decisions bearing upon other similar sections of the Indian Penal Code, the nearest decision bearing upon the point under consideration is the case decided by a Bench of this Court in *Queen-Empress* v. *Swaminatha*[1]. That case dealt with an offence under section 214, Indian Penal Code, of offering gift or restoration of property in consideration of screening an offender. The language employed in section 214 bears close resemblance to the language of section 216-A where also the intention postulated is the intention of screening any person from legal punishment for any offence. Muthuswami Ayyar and Parker, JJ., held in that case that if the main offender had been acquitted of the offences of house-breaking and theft and he was not liable to legal punishment there was no question of section 214 coming into play in the matter of offering a gift, etc., in consideration of screening such a person from legal punishment for that offence. The learned Judges observed :

> "It is contended that it is not necessary that an offence should be actually committed, or that the person charged should be really liable to be punished for such offence. We do not, however, think that it was the intention of the legislature to punish the giving of gratifications, under a delusion that an offence had been committed or that a person was guilty of such an offence. The words 'concealing an offence' and 'screening any person from legal punishment for any offence' appear to us to pre-suppose the actual commission of an offence, or the guilt of the person screened from punishment."

A recent decision of this Court decided by a single Judge, Curgenven, J., in *Rangaswami Goundan*, In re[2], dealt with a case that arose under section 216 of the Indian Penal Code. That section deals with harbouring an offender who escaped from custody and whose apprehension has been ordered. The requirements of that section are that an order of apprehension should have been issued and the person who was harbouring knew of the existence of such an order for the apprehension and with that knowledge concealed that person with the intention of preventing him from being apprehended. It would be seen that the language and elements of section 216 are radically different from those of section 216-A. The learned Judge had this particular distinction clearly in his mind in referring to several cases that arose under various sections of the Penal Code, namely, sections 201, 203, 212, 213 and 214. He pointed out that in the case of each of these sections, the nature of the offence rightly construed requires that the person in respect of whom it was committed had himself committed the offence. He also pointed out that the same must be held good with regard to section 214, Indian Penal Code, which renders punishable the screening of a person from any offence. He then observed :

> "It is clear that no person can be screened from legal punishment for an offence, if he has not rendered himself liable to it by his conduct."

Having regard to this principle and the clear distinction that exists between the language of those other sections and section 216 which the learned Judge was considering in that case he was of the opinion that the requirements of section 216 were satisfied if it was shown that there was an order of apprehension in force which the person harbouring knew when harbouring the person and he did that act for the purpose of preventing him from being apprehended. There are decisions of other High Courts on the same lines which it is unnecessary to advert to here. The principle applicable to such cases is to my mind perfectly clear that when a person charged with the substantive offence of dacoity or robbery has been acquitted of that offence, another person who is said to have intended to screen him from legal

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1. (1890) 1 M.L.J. 163 : I.L.R. 14 Mad. 400. 2. (1928) 55 M.L.J. 503 : I.L.R. 52 Mad. 73.

punishment in respect of that offence cannot be held guilty of harbouring the alleged offender under section 216-A, Indian Penal Code.

The proceedings in C. C. No. 163 of 1946 on the file of the Additional First Class Magistrate against the petitioners are quashed.

K.S. *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR.

Mushtoorappa and another .. *Appellants**

v.

Hanumanthappa and another .. *Respondents.*

Malicious prosecution—Suit for damages—Absence of reasonable and probable cause—Finding of fact—Interference in second appeal—Proof of malice—Prosecution launched by way of retaliation.

In a suit for damages for malicious prosecution the question whether there was malice or absence of reasonable and probable cause is one of fact and the High Court will not interfere in second appeal with the finding of the lower Court on the point.

Vydinadier v. *Krishnaswami Iyer*, (1911) 24 M.L.J. 515 : I.L.R. 36 Mad. 375 and *Chenna Reddi* v. *Venkataswami*, (1919) 10 L.W. 314, relied on.

Narayana Mudali v. *Peria Kalathi*, (1939) 2 M.L.J. 296, not followed.

Where in a suit for damages for malicious prosecution the ground alleged by the defendants was that they would not have started the prosecution but for one of the plaintiffs filing against them a complaint under section 211, Indian Penal Code, after a settlement reached before the Police as the result of which the original complaint was referred as of a civil nature,

Held, that in such a case the malice became definite and clear beyond doubt inasmuch as the motive which prompted the prosecution was not the laudable one of bringing an offender to justice but of retaliating against him because of an attack made by him.

Appeals respectively against the decrees of the District Court of Bellary in A. S. Nos. 132, 133, 135 and 136 of 1943, preferred respectively against the decrees of the Court of the District Munsiff of Bellary in Original Suits Nos. 405, 338, 340 and 341 of 1942.

Ch. Raghava Rao for Appellants.

Kasturi Seshagiri Rao for Respondents.

The Court delivered the following

JUDGMENT.—In suits brought for damages for malicious prosecution of the plaintiffs on a charge of dacoity, both the lower Courts have found that the prosecution was actuated by malice and was without reasonable and probable cause. They have gone further and held that the appellants falsely implicated the plaintiffs because they happened to belong to the opposite faction, and without any basis whatever for thinking that they were really guilty of the offence of dacoity with which they were charged.

I should have thought that the appellants were concluded by these concurrent findings, inasmuch as they are findings of fact. But Mr. Ch. Raghava Rao was able to cite the decision of Wadsworth, J., in *Narayana Mudali* v. *Peria Kalathi*[1], as authority for the position that the question whether there was malice or absence of reasonable and probable cause on facts found by the lower Courts is a question of law that can be gone into in second appeal. This decision is however contrary to the views taken by two Benches of this Court in *Vydinadier* v. *Krishnaswami Iyer*[2] and *Chenna Reddi* v. *Venkataswami*[3]. In the latter case attention is drawn and reliance is placed upon the observations of the Privy Council in *Pestonji M. Mody* v. *The Queen Insurance Company*[4] and dissent is expressed from the view taken by Mookerjee, J., in *Shama Bibee* v. *Chairman of Baranagore Municipality*[5], which is the

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* S. A. Nos. 782 to 785 of 1945. 12th September, 1946.

1. (1939) 2 M.L.J. 296.
2. (1911) 24 M.L.J. 515: I.L.R. 36 Mad. 375.
3. (1919) 10 L.W. 314.
4. (1900) 10 M.L.J. 300 : I.L.R. 25 Bom. 332 (P.C.).
5. (1910) 12 C.L.J. 410.

same as the view taken by Wadsworth, J. The Bench rulings are binding upon me, especially as they are supported by the pronouncement of the Privy Council.

Even if it was open to me in second appeal to consider whether the facts found by the lower Courts justified the inference they drew about the existence of malice and the absence of reasonable and probable cause, I see no grounds for reaching a different conclusion. It has been amply established that the case laid against the plaintiffs was false and that they were deliberately implicated in the occurrence when they were innocent. The ground urged for the appellants that they would not have started the prosecution but for one of the plaintiffs filing against them a complaint under section 211 of the Indian Penal Code after a settlement reached before the police as the result of which the original complaint was referred as of a civil nature, makes the position really worse for the defendants as the malice behind the prosecution becomes definite and clear beyond any doubt when once it is conceded that the motive which prompted the prosecution was not the laudable one of bringing an offender to justice but of retaliating against him because of an attack made by him.

It is true that the plaintiffs were committed to the sessions on the charge of dacoity and that in the Sessions Court two of the jurors took the view that they were guilty, but these facts cannot serve to neutralize the findings reached by the lower Courts. They are circumstances to be borne in mind in scanning the evidence in the suits for damages for malicious prosecution; and both the lower Courts have had them in mind.

The second appeals fail and are dismissed with costs.

No leave.

B.V.V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE GOVINDARAJACHARI.

Desu Rattamma .. *Appellant**

v.

Mothey Narayana Rao and others .. *Respondents.*

Hindu Law—Joint family—Debts—New business—Test—Business carried on by family in partnership with others—Continuation by family after dissolution of partnership—If extension of old business—If new or continuation of old business.

A business carried on for a time by a Hindu joint family in partnership with strangers cannot be regarded as a new business when after the dissolution of the partnership, it is carried on by the family itself.

Sri Thakur Ram Krishna Murarji v. *Ratan Chand*, (1931) 61 M.L.J. 665 : L.R. 58 I.A. 173 : I.L.R. 53 All. 190 (P.C.), referred to.

It is quite open to a joint Hindu family to discontinue trading in partnership with others or to take new persons into partnership provided however the nature of the business remains the same. The material consideration in such cases is whether the business in question is in its nature the same as or so closely allied or similar to the business which was being previously carried on by the family as to constitute a continuation or a permissible extension of it.

Where a family was never exporting any commodities and the utmost that could be assumed was that the family was buying a few commodities in and around Ellore and exporting them either to Calcutta or to the southern districts, and subsequently business was carried on in buying cashew-nut in places so far apart from Ellore as Quilon, Cochin and Trichinopoly and exporting it to a foreign country like America, that is a new type of business wholly unlike any which the family was previously carrying on. There is no objection to a family trade being extended to a new commodity. The nature or type of business is the deciding factor, not the particular commodity which is dealt with.

Damodaram Chetty v. *Bansilal Abeerchand*, (1926) 55 M.L.J. 471 : I.L.R. 51 Mad. 711 and *Kalandar Rowther* v. *Sivapuram Chettiar*, (1939) 1 M.L.J. 75-, referred to.

A debt borrowed for such new business is not binding on the share of a minor coparcener.

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* Appeal No. 515 of 1944. 28th October, 1946.

Appeal against the decree of the District Court of West Godavari, Ellore, dated 31st March, 1944, and passed in O. S. No. 27 of 1942.

V. Viyyanna for Appellant.

T. V. Ramanatha Aiyar and *V. S. Narasimhachar* for Respondents.

The Judgment of the Court was delivered by

Govindarajachari, J.—This is an appeal filed by the plaintiff in O. S. No. 27 of 1942 on the file of the District Judge of West Godavari at Ellore against the judgment and decree of that Court dated 31st March, 1944, in so far as it refused the plaintiff relief against the second defendant's share in the hypothecated properties. The short facts necessary for the disposal of the appeal are as follows.

The first defendant borrowed Rs. 5,000 from the plaintiff on the 25th April, 1927, and executed a promissory note in her favour. The promissory note, Ex. P-3, stated that the sum was borrowed "for my benefit, *i.e.*, for my business." This promissory note was renewed by another dated the 25th April, 1930, Ex. P-2, which was also for Rs. 5,000, the interest which accrued under Ex. P-3, having been paid from time to time. Ex. P-2 referred to Ex. P-3 as a promissory note previously executed and delivered "for my benefit," the maker of Ex. P-2 being again the first defendant. On the 25th August, 1931, the first defendant for himself and as guardian of the second defendant, his *aurasa* son whom he had given in adoption to his undivided paternal uncle, executed a deed of simple mortgage, Ex. P-1, for Rs. 5,700 made up of Rs. 5,639-10-0, being the principal and interest due under Ex. P-2 and a small cash advance of Rs. 60-6-0, hypothecating some of the family properties. The plaintiff filed the present suit for recovery of Rs. 10,000 after having given up Rs. 4,929-13-0 out of the amount of principal and interest due under Ex. P-1 on the date of suit. The principal contest was by the second defendant. It was alleged by him that he and the first defendant had ceased to be members of a joint Hindu family even before 1927, that the amount for which Ex. P-3 was executed was borrowed for a business started by the first defendant and that the first defendant could not give a valid mortgage of the second defendant's share in the family property for such a debt, assuming that the first and second defendants were members of a joint Hindu family in 1927 and 1931. The lower Court gave a decree to the plaintiff against the first defendant's share in the hypotheca but dismissed the suit as against the second defendant. It held that the first and second defendants were members of an undivided Hindu family in 1927 and 1931 but that the business for which the suit debt was borrowed was a new business started by the first defendant for which he could not as manager of a joint Hindu family create a valid mortgage over the share of the second defendant, a minor undivided coparcener.

The finding that the first and second defendants were undivided at all material times has not been challenged before us on behalf of the second defendant, who is the second respondent in this appeal. The argument before us related only to the finding of the lower Court regarding the character of the business for which the amount was borrowed. It is argued for the plaintiff-appellant that the first and second defendants belong to a Vysia family whose hereditary avocation or *kulachara* is trade or commerce, that the suit debt was borrowed for the purpose of a business which should be regarded as an extension of a previously existing family business and that it is therefore within the competence of the first defendant as manager of such a family to mortgage the family property for such a debt including the share of the second defendant. Alternatively, it is argued that the plaintiff made a *bona fide* inquiry regarding the purpose of the loan and was satisfied on such inquiry that the first defendant was borrowing the money for a purpose binding on the family and that in this view also the mortgage is enforceable against the second defendant's share in the hypotheca.

It may be stated at the outset that it is established by the eivdence of D. W. 1 and P. W. 3 that the amount of Rs. 5,000 was borrowed under Ex. P-3 principally,

if not wholly, for a cashew-nut business which was being conducted under the name and style of American Indian Products Company. D.W. 1 deposes that this business was financed entirely by the first defendant, that the first defendant had four partners in it who were all working partners, one of them having his headquarters in America, that the head office was at Ellore with branches at Quilon, Cochin and Trichinopoly and that the business was started in 1924 and wound up in 1929 or 1930. We see no reason to discredit the evidence of D. W. 1 to the above extent. It is common ground that the business ended in a loss; but there is no acceptable evidence as to the extent of the loss or as to whether the business earned any profit in its early years.

It is claimed for the appellant that this business is a mere extension of the business or businesses which were being conducted by the family at a time when the branch of the first and second defendants was still joint with the other branches of the Mother family and reliance is principally placed on the evidence of D. W. 2, an elderly member of that family. D. W. 2 deposes that there were originally three branches of the Mother family, that he belonged to one branch, that the first and second defendants belong to another, and that at a time when all the branches were joint the family did commission business in several commodities in partnership with strangers. In the course of his deposition D. W. 2 states as follows:

"With regard to old trades, our main branches had jointly traded with Kanigolla Siva Raghaviah Garu for about 50 years. It was also a commission business. That firm was exporting gingelly seeds, etc., to the southern districts .... There was joint business with Mothey Krishniah Garu in tobacco. It had no foreign trade. Mothey Krishniah individually traded in Calcutta after the joint business was closed."

It is argued for the appellant that these statements of D. W. 2 show that the family was exporting certain commodities to other parts of the country. It is not quite clear whether the witness means to state that the two partnerships just referred to were exporting goods on their own account to other parts of the country, because we find him stating lower down in his deposition that he does not know "in the above-mentioned commission *kottus* whether there was selling and purchasing." Even assuming that the deposition is read in the way in which the appellant's advocate would read it, we do not consider that it carries the appellant's case much further. The appellant's advocate relies on the decision of one of us in *Kalandar Rowther* v. *Sivapuram Chettiar*[1], in which after discussing the previous decisions of the Privy Council and of this High Court, it is stated:

"that too narrow a construction should not be allowed to be placed on such expressions as family trade or business and that it is absurd to suppose that if a family business should be found to have consisted in the purchase and sale of one commodity the purchase and sale of another commodity should be held to be outside the scope of the family business; and that the question whether the business was or was not a family business was to be determined in each case with regard to the recognised business, profession, means of livelihood or what is called the *kulachara* of the family in order to decide whether the particular enterprise or undertaking was only within the reasonable limits of the exercise thereof or really, having regard to its nature or extent, a new speculative enterprise."

The advocate for the contesting respondent does not challenge the accuracy of this statement of the law with which we are in full agreement. The question however remains whether the business started in 1924 or thereabouts by the first defendant could be regarded as a legitimate extension of an antecedent family business or whether it is really and in substance a new business. The evidence is no doubt rather meagre, but on such material as is available we have come to the conclusion that the business for which the suit debt was borrowed is a wholly new type of business, altogether different in its nature from the business or businesses which the family was previously carrying on. *Sri Thakur Ram Krishna Murarji* v. *Ratan Chand*[2] was also cited on behalf of the appellant. This decision establishes no more than that a

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1. (1939) 1 M.L.J. 751.
2. (1931) 61 M.L.J. 665 : L.R. 58 I.A. 173 : I.L.R. 53 All. 190 (P.C.).

business carried on for a time by a Hindu joint family in partnership with strangers cannot be regarded as a new business when after the dissolution of the partnership, it is carried on by the family itself. It is not suggested for the contesting respondent, nor do we consider that anything turns upon the circumstance that the cashew-nut business was carried on in partnership with strangers or upon the further circumstance that those partners had never traded in partnership with this family previously. It is quite open to a joint Hindu family to discontinue trading in partnership with others or to take new persons into partnership provided however the nature of the business remains the same. In our opinion, the material consideration in such cases is whether the business in question is in its nature the same as or so closely allied or similar to the business which was being previously carried on by the family as to constitute a continuation or a permissible extension of it. It is clear from the evidence that the family with which we are concerned was never exporting any commodities to foreign countries and that the utmost that could be assumed in favour of the appellant's case is that the family was buying a few commodities in and around Ellore and exporting them either to Calcutta or to the southern districts. Buying cashew-nut in places so far apart from Ellore as Quilon, Cochin and Trichinopoly and exporting it to a foreign country like America is a new type of business wholly unlike any which the family was previously carrying on. It is obvious that export or import trade with foreign countries requires knowledge of a kind which is certainly not required for and not acquired by exporting a commodity or two to places within India. The learned District Judge held that the business started by the first defendant was a new business on the ground that the family never did any business in cashew-nut previously. We do not consider this a proper way of looking at the question. As has been pointed out in *Damodaram Chetty* v. *Bansilal Abeerchand*[1] and *Kalandar Rowther* v. *Sivapuram Chettiar*[2] there is no objection to a family trade being extended to a commodity which was not previously covered by it. As we have already indicated, the nature or type of the business is the deciding factor, not the particular commodity which is dealt with. So viewed we have no doubt in agreeing with the conclusion of the learned District Judge on this part of the case, though not with his reasoning.

The alternative argument on behalf of the appellant can be shortly dealt with. The appellant herself deposes as P.W. 2 that she inquired of B. Kantayya and K. Ramachandrudu in regard to the purpose of the loan which the first defendant had asked for and that she was told by them that she could lend him the amount. B. Kantayya himself deposes as P. W. 3 that it was mentioned that the amount was principally required for the cashew-nut partnership trade, in which business in fact it was actually utilised. The inquiries made by the plaintiff or by B. Kantayya on her behalf the result of which was presumably communicated by him to the plaintiff, therefore only disclosed that the money was required for the business newly started, and the plaintiff must therefore, in order to succeed, establish that it is a business for which the first defendant could as manager of the joint family mortgage the family property. She has failed to establish this.

The decree of the lower Court exonerating the second defendant's share of the suit hypotheca is therefore correct and the appeal is accordingly dismissed with costs in favour of the second respondent.

K.S. *Appeal dismissed.*

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1. (1926) 55 M.L.J. 471 : I.L.R. 51 Mad. 711.
2. (1939) 1 M.L.J. 751.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

J. S. Mathews .. *Appellant**

Defence of India Rules (1939), *rules* 81 (4) *and* 122 *and Drugs Control Order* (1943), *clause* 11—*Prosecution of manager of retailer company for refusal to sell Glaxo when in possession of substantial stock of it—Reference to rule* 122 *of the Defence of India Rules in the charge—Necessity—Failure to frame the charge properly in this respect—Curability under section* 537, *Criminal Procedure Code—Medical certificate not disclosing the age of the patient—Refusal to sell—Not an offence.*

When the manager of a company, which falls within the category of retailers as mentioned in clause 11 of the Drugs Control Order, is prosecuted under clause 11 of the Drugs Control Order read with rule 81 (4) of the Defence of India Rules, he could only be prosecuted as manager of the retailer company by invoking the aid of rule 122 of the Defence of India Rules. Although express reference to rule 122 is not necessary, the charge should at least indicate that the person who contravened the provisions of the rules was the company or body corporate and that the accused was being held liable in respect of that contravention in his capacity as manager of the company. Where though the charge is not in this form, if the prosecution has proceeded in all its stages as if it was directed against the com pany itself and the accused has not been in any manner handicapped in his defence by reason of the defective charge, it cannot be said that there has been any serious prejudice caused to the accused and the error might be held to have been cured by section 537, Criminal Procedure Code.

The licence issued to a licensee provided that Glaxo should be sold only to those who have children below 18 months of age and who use it. A doctor's certificate which merely stated, without mentioning the name of the parent of the child or even the fact that it was required for a child, that Glaxo and Glucose-D were essential as diet for his patient was produced before the retailer and on his alleged refusal to sell Glaxo when he had substantial stock of it, he was prosecuted and convicted under rule 81 (4) of the Defence of India Rules read with clause 11 of the Drugs Control Order. On appeal,

Held, that there was absolutely nothing before the accused at the time when he was said to have refused to sell, to show that Glaxo was required for a child below 18 months of age and when this important aspect of the matter, as to whether the age of the child was disclosed to the accused has not been considered by the Magistrate the conviction cannot be upheld.

Appeal against the Judgment of the Court of the Chief Presidency Magistrate, Egmore, Madras, dated 28th March, 1946, and passed in Case No. 267 of the Calendar for 1946.

V. K. John of *Messrs. John and Row* for the Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The appellant who is manager of the show rooms of Messrs. Spencer and Company, Limited, Madras, has been convicted by the Chief Presidency Magistrate under rule 81 (4) of the Defence of India Rules read with clause 11 of the Drugs Control Order, 1943, and has been sentenced to a fine of Rs. 5,000, and in default to two months' rigorous imprisonment.

The case against the appellant in brief is this : On the 10th October, 1945, a tin of Glaxo was needed for a sick girl named Rajam aged one year. P. W. 2 who was a neighbour was approached by the girl's father. P.W. 2 made enquiries in the market, but as he was not able to get it and on learning that there were stocks at Messrs. Spencer and Co., he approached a medical practitioner, Dr. A. Narasinga Rao (P.W. 1) and obtained from him a medical certificate, Ex. P-1. Ex. P-1 merely states without mentioning the name of the parent of the child or even the fact that it was required for a child, that Glaxo and Glucose-D were essential as diet for P. W. 1's patient. It was not mentioned in that certificate that the patient was

* Crl. Appeal No. 356 of 1946. 10th October, 1946.

a child one year old. P.W. 2 who is a clerk in the office of the Special Assistant Commercial Tax Officer went with P. W. 3, the Special Assistant Commercial Tax Officer himself, to Messrs. Spencer and Co., at about 3 P.M. P. W. 3 remained outside while P. W. 2 went in and met the accused. The accused is admittedly a European who is employed in Messrs. Spencer and Co., and is not a salesman at the counter but is occupying a higher position as manager of the show rooms. Presumably he is not conversant with Tamil except knowing a few simple words. P.W. 2 says that he showed the medical certificate, Ex. P-1 to the accused and asked him for a tin of Glaxo. According to P. W. 2, the accused asked him merely whether the certificate was addressed to Messrs. Spencer and Co., and on his reply in the negative the accused told him in Tamil, "No. Go." P. W. 2 admittedly spoke to the accused in Tamil although he knew English fairly well, being a clerk in a public office. Immediately after obtaining the negative reply from the accused, P. W. 2 went to P. W. 3 who was stationed just outside, and both of them returned to the accused, and P. W. 3 questioned the accused why he had refused to sell a tin of Glaxo to P. W. 2. P. W. 3 disclosed to him his official capacity, and thereupon the accused informed him forthwith that he had refused to sell for two reasons, namely, that the age of the patient was not given in Ex. P-1, and the certificate was not addressed to Spencer and Co. The third reason which the accused gives that he did not understand the Tamil words which were spoken by P. W. 2 was not according to P. W. 3 given out to him then. Immediately after this statement, P. W. 3 checked the stock of Glaxo in the shop and found that there was substantial stock available. He also examined P. W. 2 and the accused and recorded their statements, Exs. P-2 and P-3. In his statement, Ex. P-3, the accused gave out that after seeing the doctor's certificate produced by P. W. 2 he refused to supply because the age of the patient was not given therein and the certificate was not addressed to Messrs. Spencer and Co. Upon these facts the accused was prosecuted under clause 11 of the Drugs Control Order read with rule 81 (4) of the Defence of India Rules.

Learned counsel for the appellant has raised a preliminary objection of a technical nature. He contends that the charge is defective and that in consequence of the error in the charge he has been substantially prejudiced. The charge does not state that the offence was committed by Messrs. Spencer and Co., and that the accused being the manager of the company was being charged as such under the Drugs Control Order.

Clause 4 of the Drugs Control Order provides that no person shall carry on the business of a retailer at any place in British India except under and in accordance with the conditions of a valid licence. Under clause 7 the licensing authority may specify in the licence the conditions subject to which it is issued and the licensee is bound to comply with those conditions. Clause 11 provides that no retailer shall refuse to sell any drug without reasonable cause. In clause 11, there are four categories of persons mentioned, namely, manufacturer, importer, wholesaler and retailer and Messrs. Spencer and Co., are, for the purposes of this case, retailers. The accused in his individual capacity does not fall under any of these categories. He could, therefore, be only prosecuted as the manager of the retailer company by invoking the aid of rule 122 of the Defence of India Rules. Under that rule if the person contravening any of the provisions of the rule is a company or other body corporate, its manager shall be deemed to be guilty of such contravention unless he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. Rule 122 has not been expressly referred to in the charge. Although express reference is not necessary, the charge should at least have indicated that the person who contravened the provisions of the rules, was the company or the body corporate and that the accused was being held liable in respect of that act in his capacity as manager of the company. In the preamble, in describing the accused, the designation of manager of Spencer and Co. is no doubt used. But in the body of the charge, there are no words to

indicate that it was the company that was being charged through its manager, the accused, with reference to the principle of liability enacted in rule 122 of the Defence of India Rules. It is urged for the defence that this defect in the charge has caused material prejudice to the appellant. I am not satisfied, however, that on that account there has been any serious prejudice caused, since as far as I am able to see, the prosecution proceeded in all its stages as if it was directed against the company itself and the accused was not in any manner handicapped in his defence, by reason of the defective charge. The error might be held to have been cured by section 537, Criminal Procedure Code.

Coming to the merits of the case, the principal fact to be noticed is that nobody interested in the child has appeared in the picture. The chief, if not the only, persons who have played any part in this affair are persons connected with the Commercial Tax Department. The conduct of P. W. 2 was remarkable. He is a clerk and from the ability to speak English that he demonstrated subsequently, it is clear that when he first went to the accused and asked him in Tamil for a tin of Glaxo he was doing it with a set purpose. He produced a doctor's certificate and according to him the accused did not even look at it. He has repeated this statement more than once, first in his examination-in-chief and later in his further cross-examination. On the contrary, P. W. 3 who went into the shop immediately with P. W. 2 stated that when P. W. 2 came back after getting a refusal from the accused he told him that the accused had seen the medical certificate and had still refused to sell. The conduct of P. W. 2 in talking to the accused in Tamil and in slipping out immediately after the accused used the words, "No. Go." to bring P. W. 3 in order to make search of the stock and the incorrect statement that he has made as regards the inspection by the accused of the certificate—these circumstances very clearly indicate that P. W. 2's evidence is not worthy of credit. P.W. 3 played a relatively minor part. He was told by P. W. 2 that there was a refusal by the accused and he went in. As soon as he went in, the accused told him that since the age of the patient was not given in the certificate and since the certificate was not addressed to Messrs. Spencer & Co. he had refused to sell. This is the consistent position which the appellant had adopted throughout and having regard to the provisions of the licence which the company was bound scrupulously to follow, it cannot be said that the attitude of refusal on the part of the appellant was unjustified. As pointed out, under clause 7 of the Drugs Control Order, the licensee is bound to comply with the conditions of the licence issued to him. The licence itself is Ex. D-1. In paragraph 2 of the licence, it is specifically mentioned with reference to Glaxo that its retail sale should be regulated by registering the applications and distributing only to registered applicants. The direction is that only 10 per cent. of the total supply should be reserved for emergency demands to be issued to those who produce medical certificates. Lastly, it is provided in the licence that Glaxo should be sold only to those who have children below 18 months of age and who use it. It was imperative, therefore, for the company and its officers to satisfy themselves before issuing even a single tin that the person who was to use it was a child below 18 months of age. In the present case, there was absolutely nothing before the appellant, at the time when he is said to have refused to sell, to show that it was required for a child below 18 months of age. The natural conduct on the part of a person who was in sore need of a tin of Glaxo for a sick child would have been to question the person who had refused to sell why he did so and if he was told that there was no mention in the certificate about the age of the child he would have immediately furnished to the company satisfactory evidence about the age of the child. But apparently the object of P. W. 2 was not to secure a tin of Glaxo but to lay a trap and it is for that purpose that he had P. W. 3 at his elbow and the promptitude with which P. W. 2 ran out as soon as the accused used the words "No. Go." and P. W. 3 came in and the search was made shows that the entire transaction was *mala fide* and pre-arranged.

It must be noted before concluding that the most important aspect of the matter, namely, whether the age of the child was disclosed to the appellant before the tin

of Glaxo was asked for, was not considered by the learned Chief Presidency Magistrate although the point was definitely raised before him and it has so happened that this appeal has turned wholly upon that question. In the view I have taken on this matter, it is not necessary to examine the other reasons that have been given by the accused for refusing to supply the tin. From any point of view, I am unable to agree with the conclusion of the Chief Presidency Magistrate that that the refusal in this case by the appellant to sell to P.W. 2 a tin of Glaxo on 10th October, 1945, was without reasonable cause.

The appeal is allowed and the conviction and sentence are set aside; the fine if paid shall be refunded.

V.S. *Appeal allowed.*

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261	—	,,	2	131
265	—	,,	2	117
268	—	,,	1	427
272	—	,,	2	78
276	—	,,	2	208
289	—	,,	2	2
299	—	,,	2	87
301	—	,,	2	115
306	—	(1946)	1	140
311	—	(1945)	2	140
314	—	,,	2	158
317	—	,,	2	133
322	—	,,	2	176
325	—	,,	2	120
330	—	,,	2	112
333	—	,,	2	155
343	—	,,	2	264
349	—	,,	2	177
356	—	,,	2	307
367	—	,,	2	80
379 (P.C.)	—	,,	2	259
389	—	(1946)	1	42

I.L.R. (1946) MAD.			M.L.J.	
416	—	(1945)	2	389
423	—	,,	2	422
429	—	(1946)	1	31
452	—	,,	1	259
459	—	,,	1	95
461	—	(1945)	2	180
465	—	,,	2	363
470	—	,,	2	371
475	—	,,	2	228
486	—	,,	2	318
504	—	,,	2	204
507	—	(1946)	1	53
510	—	(1945)	2	249
514	—	,,	2	366
517 (P.C.)	—	(1946)	1	280
521	—	,,	1	218
527	—	(1945)	2	456
531	—	,,	2	513
536	—	,,	2	403
542	—	,,	2	427
548	—	,,	2	418
557	—	,,	2	504
566	—	(1946)	1	200
593	—	(1945)	2	479
599	—	(1946)	1	164
640	—	(1945)	2	567
648	—	,,	2	508
659	—	,,	2	455
663	—	,,	2	541
665	—	(1946)	1	400
670	—	,,	1	58
672	—	,,	1	64
676	—	,,	1	97
687	—	,,	1	23
707	—	(1945)	2	525
720	—	,,	2	544
727	—	(1946)	1	1
730	—	,,	2	365
736	—	,,	1	372
739	—	,,	2	82
745	—	,,	1	120
755	—	,,	1	108
760	—	,,	1	287
768	—	,,	1	222
777	—	,,	1	113
795	—	,,	1	17
809	—	(1945)	2	547
816	—	(1945)	1	406
817	—	(1946)	1	128
821	—	,,	1	190
824	—	,,	1	111
828	—	,,	1	193
834	—	,,	1	229
840	—	,,	1	185
846	—	,,	1	226
854	—	,,	1	198
858	—	,,	1	310
885	—	,,	1	61
889	—	,,	1	192
892	—	,,	1	237

(1946) 1 M.L.J.	I.L.R. 1946 MAD.	59 LAW WEEKLY.	1946 M.W.N.
1	727	18	37
2	—	—	18
5	—	14	25
8	—	43	41
11	—	—	20
17	795	—	195 (2)
23	687	151	—
31	429	736	9
42	389	22	49
53	507	38	74 (1)
54	—	36	66
57	—	61	176
58	670	33	75
59	—	—	72
61	885	41	80
63	—	62	44
64	672	34	78
66	—	60	70
68	—	39	58
70 (P.C.)	—	346	172
74 (P.C.)	—	89	106
77 (P.C.)	—	90	105 (2)
79 (P.C.)	—	—	—
80	—	79	92
82	—	19	68
85	—	17	79
86	—	80	94
87	—	354	140
90	—	86	96
92	—	84	93
94	—	83	149
95	459	63	104
96	—	82	433
97	676	—	108
103	—	85	206
104	—	351	128
107	—	—	—
108	755	98	112
110	—	81	105 (1)
111	824	96	126
113	777	52	86
120	745	100	114
123 (P.C.)	—	88	339
125 (P.C.)	—	92	180
128	817	103	148
129	—	271	143
131	—	94	144
133	—	142	153
134	—	—	—
135	—	—	—
136	—	147	152
138	—	183	146
140	306	109	117
143	—	—	76
145	—	—	—
147 (P.C.)	—	516	97
152 (P.C.)	—	111	310
155	—	360	81
157	—	358	83
159	—	189	301
161	—	—	150
163	—	145	147
164	599	115 (2)	316
179	—	160	154
181	—	185	208
185	840	143	136
187	—	196	119
190	821	141	198
192	889	150	207
193	828	190	122
196	—	194	185
198	854	192	124

(1946) 1 M.L.J.	I.L.R. 1946 MAD.	59 LAW WEEKLY.	1946 M.W.N.
200	566	67	27
211 (P.C.)	—	198	103
212 (P.C.)	—	105	186
216	—	139	121
218	521	161	203
220	—	148	175
222	768	169	288
226	846	176	130
229	834	166	133
233	—	—	250
237	892	163	272
239	—	165	205
241	—	—	256
244	—	182	213
245	—	—	401
247	—	175	214
249	—	180	216
252	—	—	361
253	—	—	—
255	—	211	218
259	452	200	211
262	—	349	457
264	—	205	235
267	—	—	224
271	—	202	385
272	—	203	415
274	—	279	343
275	—	—	342
277	—	219	432
278	—	214	388
280 (P.C.)	517	199	312
282	—	220	237
285	—	224	384
286	—	218	353
287	760	—	155
291	—	207	276 (2)
295 (P.C.)	—	196	164
297	—	172	200
300	—	216	—
303	—	255	231
307	—	—	223 (1)
308	—	—	393
310	858	227	240
322	—	630	265
327	—	306	279
330	—	225	315
331	—	240 (1)	276 (1)
332	—	225 (2)	302
333 (P.C.)	—	312	158
337	—	245	335
339 (P.C.)	—	309	161
342	—	244	223 (2)
343	—	246	254
346	—	278	287
347	—	240 (2)	227
351	—	260	258
354	—	263	260
358	—	250	221
361	—	239	275
362	—	254	264
364	—	—	191
368	—	252	271
370	—	276	344
372	736	275	355
373	—	280	282
379	—	302	366
383	—	362	327
392	—	356	387
393	—	294	313
395	—	287	399
397	—	—	474 (1)
398	—	289	359

(1946) 1 M.L.J.	I.L.R. 1946 MAD.	59 LAW WEEKLY.	1946 M.W.N.
400	665	286	304
402	—	293	306
403	—	357	414
405	—	—	550 (1)
406	816	277	357 (2)
407	—	296	307
409	—	327	413
411	—	330	397
413	—	325 (2)	357 (1)
414	—	323	394
415	—	—	292
426 (P.C.)	—	—	166
433	—	—	303
445	—	299	358 (2)
436	—	328	352 (1)
437	—	326	354
438	—	342	362
443	—	300	356
444	—	334	345 (2)
448	—	329	480
449	—	331	349
452	—	291	417
454	—	339	429
457	—	325 (1)	358 (1)
458	—	301 (1)	345 (1)
459	—	301 (2)	386
461	—	322	352 (2)
462	—	624	336
466	—	273	269
(1946) 2 M.L.J.			
1 (P.C.)	—	415	474 (2)
10 (P.C.)	—	405	488
16	—	315	427
17 (F.C.)	—	379	656
23 (F.C.)	—	—	541
29 (P.C.)	—	713	492
35	—	—	369
53	—	—	402
65	—	391	462
67	—	385	502
69	—	387	483
72	—	319	422
75	—	392	464
79	—	401	548
80	—	402	467
82	739	398	486
85	—	394	481
88 (P.C.)	—	—	—
93 (P.C.)	—	374	—
98 (P.C.)	—	268	389
103	—	397	463
104	—	—	—
105	—	317	425
108	—	413 (2)	504
110	—	409	496
111	—	413 (1)	507
112	—	410	579
113	—	404	576
114	—	411	506
115	—	412	505
117	—	426	571
121	—	538	534
123	—	448	529
126	—	441	567
128	—	451	663
130	—	450	547
132	—	445	530
135	—	443	532
137	—	455	550 (2)
141	—	453	568
143	—	430	553
156 (P.C.)	—	489	520

(1946) 2 M.L.J.	I.L.R.* 1946 MAD.	59 LAW WEEKLY.	1946 M.W.N.
165	—	—	508 (1)
166	—	464	574
168	—	463	627
169	—	459	546
171	—	470	577
173	—	469	591
175	—	565	508 (2)
188	—	461	569
190	—	460	575
192	—	468	565
193	—	466	563
195	—	472	585
200 (P.C.)	—	554 (2)	468
207	—	502	593
209	—	507	594
210	—	508	589
213	—	506	595
214	—	504	605
217	—	500	604
219	—	510	610
221	—	499	596
223 (P.C.)	—	477	580
229	—	520	609
231	—	523	625
233	—	525	607
235 (P.C.)	—	483	497
241	—	527	618
243	—	522	619
245	—	533	612
248	—	529	615
251	—	540	667
253	—	542	641
255	—	531	628
257	—	536	654
259 (P.C.)	—	370	598
262	—	544	636
266	—	549	629
268	—	—	631
270	—	551	639
271	—	554 (1)	763
272	—	559	672
273	—	552	634
275	—	561	643 (2)
276	—	562	632
279	—	560	668
280	—	564	665
281	—	548	666
282	—	583	644
285	—	579 (1)	643 (1)
290 (P.C.)	—	579 (2)	601
295 (P.C.)	—	513	—
297 (P.C.)	—	650	620
299 (P.C.)	—	652	622
303	—	593	662
305	—	592	673
307	—	602	676
311	—	608	669
315	—	589	674
318	—	605	723
321	—	612	687
322	—	614	697
329	—	623	729 (2)
330	—	611	695
332	—	622	731 (1)
333	—	620	694
335	—	634	679
345	—	627	713
348	—	647	730
349	—	645	602
350	—	648	689 (1)
351	—	—	689 (2)
355	—	661	751

(1946) 2 M.L.J.	I.L.R. 1946 Mad.	59 Law Weekly.	1946 M.W.N.
357	—	663	725
361	—	649	705
362	—	660	755
364	—	646	734
365	730	749	—
368	—	666	721
371	—	657	703
373	—	677	745
377	—	643	757
380	—	655	753
382	—	683	—
383	—	685	737
393	—	668	716
400	—	—	731 (2)
401	—	695 (2)	754
403	—	694	736
404	—	697	748
407	—	695 (1)	729 (1)
408 (P.C.)	—	681	—
411 (P.C.)	—	717	—
420 (P.C.)	—	701	—
427	—	753	735
428	—	—	762 (1)
429	—	710	—
432	—	699	—
433	—	—	733
435	—	—	732
436	—	—	—
442 (P.C.)	—	—	—
453 (P.C.)	—	—	759
457 (P.C.)	—	—	—
459	—	—	—
461	—	—	762 (2)
462	—	707	—
465	—	—	—
473	—	—	—
476	—	—	—
479	—	—	768
480	—	751	766
482	—	—	—
484	—	—	—
485	—	—	—
489	—	—	764

59 L.W.	M.L.J.		
1 (P.C.)	(1945)	2	356
7 (P.C.)	,,	2	493
9 (P.C.)	,,	2	486
14	(1946)	1	5
17	,,	1	85
18	,,	1	1
19	,,	1	82
22	,,	1	42
33	,,	1	58
34	,,	1	64
36	,,	1	54
38	,,	1	53
39	,,	1	68
41	,,	1	61
43	,,	1	8
46 (P.C.)	(1945)	2	393
52	(1946)	1	113
60	,,	1	66
61	,,	1	57
62	,,	1	63
63	,,	1	95
64	(1945)	2	582
67	(1946)	1	200
79	,,	1	80
80	,,	1	86
81	,,	1	110
82	,,	1	96

59 L.W.	M.L.J.		
83	(1946)	1	94
84	,,	1	92
85	,,	1	103
86	,,	1	90
88 (P.C.)	,,	1	123
89 (P.C.)	,,	1	74
90 (P.C.)	,,	1	77
92 (P.C.)	,,	1	125
94	,,	1	131
96	,,	1	111
98	,,	1	108
100	,,	1	120
103	,,	1	128
104 (P.C.)	,,	..	
105 (P.C.)	,,	1	212
109	,,	1	140
111 (P.C.)	,,	1	152
114	(1945)	2	585
115 (1)	,,	2	574
115 (2)	(1946)	1	164
129	(1945)	2	575
130	(1946)	1	193
132	,,	1	198
134	,,	1	196
136	,,	1	187
138 (P.C.)	,,	1	211
139	,,	1	216

59 L.W.		M.L.J.		
141		(1946)	1	190
142		,,	1	133
143		,,	1	185
145		,,	1	163
147		,,	1	136
148		,,	1	220
150		,,	1	192
151		,,	1	23
160		,,	1	179
161		,,	1	218
163		,,	1	237
165		,,	1	239
166		,,	1	229
169		,,	1	222
172		,,	1	297
175		,,	1	247
176		,,	1	226
180		,,	1	249
182		,,	1	244
183		,,	1	138
185		,,	1	181
189		,,	1	159
191		(1945)	2	208
196	(P.C.)	(1946)	1	295
199	(P.C.)	,,	1	280
200		,,	1	259
202		,,	1	271
203		,,	1	272
205		,,	1	264
207		,,	1	291
211		,,	1	255
214		,,	1	278
216		,,	1	300
218		,,	1	286
219		,,	1	277
220		,,	1	282
224		,,	1	285
225	(1)	,,	1	330
225	(2)	,,	1	332
227		,,	1	310
239		,,	1	361
240	(1)	,,	1	331
240	(2)	,,	1	347
244		,,	1	342
245		,,	1	337
246		,,	1	343
248	(P.C.)		..	
250		,,	1	358
252		,,	1	368
254		,,	1	362
255		,,	1	303
260		,,	1	351
262	(P.C.)		..	
263		,,	1	354
268	(P.C.)	,,	2	98
271		,,	1	129
273		,,	1	466
275		,,	1	372
276		,,	1	370
277		,,	1	406
278		,,	1	346
279		,,	1	274
280		,,	1	373
286		,,	1	400
287		,,	1	395
289		,,	1	398
291		,,	1	452
293		,,	1	402
294		,,	1	393
296		,,	1	407
299		,,	1	435
300		,,	1	443
301	(1)	,,	1	458
301	(2)	,,	1	459
302		(1946)	1	379
306	(F.C.)	,,	1	327
309	(P.C.)	,,	1	339
312	(P.C.)	,,	1	333
315		,,	2	16
317		,,	2	105
319		,,	2	72
322		,,	1	461
323		,,	1	414
325	(1)	,,	1	457
325	(2)	,,	1	413
326		,,	1	437
327		,,	1	409
328		,,	1	436
329		,,	1	448
330		,,	1	411
331		,,	1	449
334		,,	1	444
339		,,	1	454
342		,,	1	438
346	(P.C.)	,,	1	70
349		,,	1	262
351		,,	1	104
354		,,	1	87
356		,,	1	392
357		,,	1	403
358	(F.C.)	,,	1	157
360	(F.C.)	,,	1	155
362		,,	1	383
370	(P.C.)	,,	2	259
374	(P.C.)	,,	2	93
379	(F.C.)	,,	2	17
385		,,	2	67
387		,,	2	69
391		,,	2	65
392		,,	2	75
394		,,	2	85
397		,,	2	103
398		,,	2	82
401		,,	2	79
402		,,	2	80
404		,,	2	113
405	(P.C.)	,,	2	10
409		,,	2	110
410		,,	2	112
411		,,	2	114
412		,,	2	115
413	(1)	,,	2	111
413	(2)	,,	2	108
415	(P.C.)	,,	2	1
422	(P.C.)	,,	..	
426		,,	2	117
430		,,	2	143
441		,,	2	126
443		,,	2	135
445		,,	2	132
448		,,	2	123
450		,,	2	130
451		,,	2	128
453		,,	2	141
455		,,	2	137
459		,,	2	169
460		,,	2	190
461		,,	2	188
463		,,	2	168
464		,,	2	166
466		,,	2	193
468		,,	2	192
469		,,	2	173
470		,,	2	171
472		,,	2	195
477	(P.C.)	,,	2	223
483	(P.C.)	,,	2	235

59 L.W.		M.L.J.		
489 (P.C.)	=	(1946)	2	156
499	=	,,	2	221
500	=	,,	2	217
502	=	,,	2	207
504	=	,,	2	214
506	=	,,	2	213
507	=	,,	2	209
508	=	,,	2	210
510	=	,,	2	219
513 (P.C.)	=	,,	2	295
516 (P.C.)	=	,,	1	147
520	=	,,	2	229
522	=	,,	2	243
523	=	,,	2	231
525	=	,,	2	233
527	=	,,	2	241
529	=	,,	2	248
531	=	,,	2	255
533	=	,,	2	245
536	=	,,	2	257
538	=	,,	2	121
540	=	,,	2	251
542	=	,,	2	253
544	=	,,	2	262
548	=	,,	2	281
549	=	,,	2	266
551	=	,,	2	270
552	=	,,	2	273
554 (1)	=	,,	2	271
554 (2) (P.C.)	=	,,	2	200
559	=	,,	2	272
560	=	,,	2	279
561	=	,,	2	275
562	=	,,	2	276
564	=	,,	2	280
565	=	,,	2	175
579 (1)	=	,,	2	285
579 (2) (P.C.)	=	,,	2	290
583	=	,,	2	282
585 (P.C.)	=		..	
589	=	,,	2	315
592	=	,,	2	305
593	=	,,	2	303
595 (P.C.)	=		..	
602	=	,,	2	307
605	=	,,	2	318
608	=	,,	2	311
61[illegible]	=	,,	2	330

59 L.W.		M.L.J.		
612	=	(1946)	2	321
614	=	,,	2	322
620	=	,,	2	333
622	=	,,	2	332
623	=	,,	2	329
624	=	,,	1	462
627	=	,,	2	345
630 (P.C.)	=	,,	1	322
634	=	,,	2	335
643	=	,,	2	377
645	=	,,	2	349
646	=	,,	2	364
647	=	,,	2	348
648	=	,,	2	350
649	=	,,	2	361
650	=	,,	2	297
652	=	,,	2	299
655	=	,,	2	380
657	=	,,	2	371
660	=	,,	2	362
661	=	,,	2	355
663	=	,,	2	357
666	=	,,	2	368
668	=	,,	2	393
675	=	(1945)	2	573
676	=	,,	2	576
677	=	(1946)	2	373
681 (P.C.)	=	,,	2	408
683	=	,,	2	382
685	=	,,	2	383
694	=	,,	2	403
695 (1)	=	,,	2	407
695 (2)	=	,,	2	401
697	=	,,	2	404
699	=	,,	2	432
701 (P.C.)	=	,,	2	420
707	=	,,	2	462
710	=	,,	2	429
713 (P.C.)	=	,,	2	29
717 (P.C.)	=	,,	2	411
725	=	,,	1	31
736	=	(1945)	2	547
739	=	,,	2	2
743	=	,,	2	525
749	=	(1946)	2	365
751	=	,,	2	480
753	=	,,	2	427

1946 M.W.N.		M.L.J.		
1 (P.C.)	=		..	
5	=	(1945)	2	458
7	=	,,	2	576
8	=	,,	2	521
9	=	(1946)	1	31
18	=	,,	1	2
20	=	,,	1	11
25	=	,,	1	5
27	=	,,	1	200
37	=	,,	1	1
38	=	(1945)	2	564
39	=	,,	2	563
40	=	,,	2	571
41	=	(1946)	1	8
44	=	,,	1	63
45	=	(1945)	2	582
49	=	(1946)	1	42
58	=	,,	1	68
59 (P.C.)	=	(1945)	2	496
66	=	(1946)	1	54
68	=	,,	1	82

1946 M.W.N.		M.L.J.		
70	=	(1946)	1	66
72	=	,,	1	59
74 (1)	=	,,	1	53
74 (2)	=		..	
75	=	,,	1	58
76	=	,,	1	143
78	=	,,	1	64
79	=	,,	1	85
80	=	,,	1	61
81 (P.C.)	=	,,	1	155
83 (P.C.)	=	,,	1	157
84	=	(1945)	2	585
85 (1)	=	,,	2	574
85 (2)	=	,,	2	575
86	=	(1946)	1	113
92	=	,,	1	80
93	=	,,	1	92
94	=	,,	1	86
96	=	,,	1	90
97 (P.C.)	=	,,	1	147
101 (P.C.)	=	(1945)	2	493
103 (P.C.)	=	(1946)	1	211

1946 M.W.N.		M.L.J.		
104	=	(1946)	1	95
105 (1)	=	,,	1	110
105 (2) (P.C.)	=	,,	1	77
106 (P.C.)	=	,,	1	74
108	=	,,	1	97
112	=	,,	1	108
114	=	,,	1	120
117	=	,,	1	140
119	=	,,	1	167
121	=	,,	1	216
122	=	,,	1	193
124	=	,,	1	196
126	=	,,	1	111
128	=	,,	1	104
130	=	,,	1	226
133	=	,,	1	229
136	=	,,	1	185
138	=	,,	1	190
140	=	,,	1	87
143	=	,,	1	129
144	=	,,	1	131
146	=	,,	1	138
147	=	,,	1	163
148	=	,,	1	128
149	=	,,	1	94
150	=	,,	1	161
152	=	,,	1	136
153	=	,,	1	133
154	=	,,	1	179
155	=	,,	1	287
158 (P.C.)	=	,,	1	333
161 (P.C.)	=	,,	1	339
164 (P.C.)	=	,,	1	295
166 (P.C.)	=	,,	1	426
172 (P.C.)	=	,,	1	70
175	=	,,	1	220
176	=	,,	1	57
177 (P.C.)	=		..	
180 (P.C.)	=	,,	1	125
182 (P.C.)	=		..	
185	=	,,	1	196
186 (P.C.)	=	,,	1	212
191 (P.C.)	=	,,	1	364
195 (1) (P.C.)	=		..	
195 (2)	=	,,	1	17
200	=	,,	1	297
203	=	,,	1	218
205	=	,,	1	239
206	=	,,	1	103
207	=	,,	1	192
208	=	,,	1	181
211	=	,,	1	259
213	=	,,	1	244
214	=	,,	1	247
216	=	,,	1	249
218	=	,,	1	255
221	=	,,	1	358
223 (1)	=	,,	1	307
223 (2)	=	,,	1	342
224	=	,,	1	267
227	=	,,	1	347
231	=	,,	1	303
235	=	,,	1	264
237	=	,,	1	282
240	=	,,	1	310
250	=	,,	1	233
254	=	,,	1	343
256	=	,,	1	241
258	=	,,	1	351
260	=	,,	1	354
264	=	,,	1	362
265 (F.C.)	=	,,	1	322
269	=	,,	1	466

1946 M.W.N.		M.L.J.		
271	=	(1946)	1	368
272	=	,,	1	237
274	=	(1945)	2	541
275	=	(1946)	1	361
276 (1)	=	,,	1	331
276 (2)	=	,,	1	291
279 (F.C.)	=	,,	1	327
282	=	,,	1	373
287	=	,,	1	346
288	=	,,	1	222
292	=	,,	1	415
301	=	,,	1	159
302	=	,,	1	332
303	=	,,	1	433
304	=	,,	1	400
306	=	,,	1	402
307	=	,,	1	407
310 (P.C.)	=	,,	1	152
312 (P.C.)	=	,,	1	280
313	=	,,	1	393
315	=	,,	1	330
316	=	,,	1	164
327	=	,,	1	383
335	=	,,	1	337
336	=	,,	1	462
339 (P.C.)	=	,,	1	123
340 (P.C.)	=		..	
342	=	,,	1	275
343	=	,,	1	274
344	=	,,	1	370
345 (1)	=	,,	1	458
345 (2)	=	,,	1	444
349	=	,,	1	449
352 (1)	=	,,	1	436
352 (2)	=	,,	1	461
353	=	,,	1	286
354	=	,,	1	437
355	=	,,	1	372
356	=	,,	1	443
357 (1)	=	,,	1	413
357 (2)	=	,,	1	406
358 (1)	=	,,	1	457
358 (2)	=	,,	1	435
359	=	,,	1	398
361	=	,,	1	252
362	=	,,	1	438
366	=	,,	1	379
369	=	,,	2	35
384	=	,,	1	285
385	=	,,	1	271
386	=	,,	1	459
387	=	,,	1	392
388	=	,,	1	278
389 (P.C.)	=	,,	2	98
393	=	,,	1	308
394	=	,,	1	414
395	=	,,	1	300
397	=	,,	1	411
399	=	,,	1	395
401	=	,,	1	245
402	=	,,	2	53
413	=	,,	1	409
414	=	,,	1	403
415	=	,,	1	272
417	=	,,	1	452
419 (P.C.)	=		..	
422	=	,,	2	72
425	=	,,	2	105
427	=	,,	2	16
428 (P.C.)	=		..	
429	=	,,	1	454
432	=	,,	1	277
433	=	,,	1	96

1946 M.W.N.		M.L.J.		
434	=	(1945)	2	522
437	=	,,	2	525
442	=	,,	2	297
447	=	,,	2	337
457	=	(1946)	1	262
459	=	(1945)	2	573
460	=	,,	2	432
462	=	(1946)	2	65
463	=	,,	2	103
464	=	,,	2	75
467	=	,,	2	80
468 (P.C.)	=	,,	2	200
474 (1)	=	,,	1	397
474 (2) (P.C.)	=	,,	2	1
480	=	,,	1	448
481	=	,,	2	85
483	=	,,	2	69
486	=	,,	2	82
488 (P.C.)	=	,,	2	10
492 (P.C.)	=	,,	2	29
496	=	,,	2	110
497 (P.C.)	=	,,	2	235
502	=	,,	2	67
504	=	,,	2	108
505	=	,,	2	115
506	=	,,	2	114
507	=	,,	2	111
508 (1)	=	,,	2	165
508 (2)	=	,,	2	175
520 (P.C.)	=	,,	2	156
529	=	,,	2	123
530	=	,,	2	132
532	=	,,	2	135
534	=	,,	2	121
537 (P.C.)	=	,,	..	
541 (P.C.)	=	,,	2	23
546	=	,,	2	169
547	=	,,	2	130
548	=	,,	2	79
550 (1)	=	,,	1	405
550 (2)	=	,,	2	137
553	=	,,	2	143
563	=	,,	2	193
565	=	,,	2	192
566	=	,,	2	141
567	=	,,	2	126
569	=	,,	2	188
571	=	,,	2	117
574	=	,,	2	166
575	=	,,	2	190
576	=	,,	2	113
577	=	,,	2	171
579	=	,,	2	112
580 (P.C.)	=	,,	2	223
585	=	,,	2	195
589	=	,,	2	210
591	=	,,	2	173
593	=	,,	2	207
594	=	,,	2	209
595	=	,,	2	213
596	=	,,	2	221
598 (P.C.)	=	,,	2	259
601 (P.C.)	=	,,	2	290
604	=	,,	2	217
605	=	,,	2	214
607	=	,,	2	233
609	=	,,	2	229
610	=	,,	2	219
612	=	,,	2	245
615	=	,,	2	248
618	=	,,	2	241

1946 M.W.N.		M.L.J.		
619	=	(1946)	2	243
620 (P.C.)	=	,,	2	297
622 (P.C.)	=	,,	2	299
625	=	,,	2	231
627	=	,,	2	168
628	=	,,	2	255
629	=	,,	2	266
631	=	,,	2	268
632	=	,,	2	276
634	=	,,	2	273
636	=	,,	2	262
639	=	,,	2	270
641	=	,,	2	253
643 (1)	=	,,	2	285
643 (2)	=	,,	2	275
644	=	,,	2	282
646	=	(1945)	2	164
654	=	(1946)	2	257
656 (P.C.)	=	,,	2	17
662	=	,,	2	303
663	=	,,	2	128
665	=	,,	2	280
666	=	,,	2	281
667	=	,,	2	251
668	=	,,	2	279
669	=	,,	2	311
672	=	,,	2	272
673	=	,,	2	305
674	=	,,	2	315
676	=	,,	2	307
679	=	,,	2	335
687	=	,,	2	321
689 (1)	=	,,	2	350
689 (2)	=	,,	2	351
692	=	,,	2	349
694	=	,,	2	333
695	=	,,	2	330
697	=	,,	2	322
703	=	,,	2	371
705	=	,,	2	361
706 (P.C.)	=	,,	2	411
713	=	,,	2	345
716	=	,,	2	393
721	=	,,	2	368
723	=	,,	2	318
725	=	,,	2	357
729 (1)	=	,,	2	407
729 (2)	=	,,	2	329
730	=	,,	2	348
731 (1)	=	,,	2	332
731 (2)	=	,,	2	400
732	=	,,	2	435
733	=	,,	2	433
734	=	,,	2	364
735	=	,,	2	427
736	=	,,	2	403
737	=	,,	2	383
745	=	,,	2	373
748	=	,,	2	404
751	=	,,	2	355
753	=	,,	2	380
754	=	,,	2	401
755	=	,,	2	362
757	=	,,	2	377
759 (P.C.)	=	,,	2	453
762 (1)	=	,,	2	428
762 (2)	=	,,	2	461
763	=	,,	2	271
764	=	,,	2	489
766	=	,,	2	480
768	=	,,	2	479